

**ARKANSAS CODE
OF 1987
ANNOTATED**

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VOLUME 3B • TITLE 5, CH. 50-79



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ARKANSAS CODE OF 1987 ANNOTATED



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TITLE 5: CRIMINAL OFFENSES (CHAPTERS 50-79)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2005 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2005 Ark. LEXIS 504 (September 22, 2005) and 2005 Ark. App. LEXIS 696 (September 28, 2005).

Federal Supplement through September 28, 2005.

Federal Reporter 3d Series through September 28, 2005.

United States Supreme Court Reports, through September 28, 2005.

Bankruptcy Reporter through September 28, 2005.

Arkansas Law Notes through the 2001 Edition.

Arkansas Law Review through Volume 57, p. 441.

University of Arkansas at Little Rock Law Journal through Volume 26, p. 513.

ALR 6th through Volume 4, p. 599.

Titles of the Arkansas Code

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| 2. Agriculture | 16. Practice, Procedure, and Courts |
| 3. Alcoholic Beverages | 17. Professions, Occupations, and Businesses |
| 4. Business and Commercial Law | 18. Property |
| 5. Criminal Offenses | 19. Public Finance |
| 6. Education | 20. Public Health and Welfare |
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| 8. Environmental Law | 22. Public Property |
| 9. Family Law | 23. Public Utilities and Regulated Industries |
| 10. General Assembly | 24. Retirement and Pensions |
| 11. Labor and Industrial Relations | 25. State Government |
| 12. Law Enforcement, Emergency Management, and Military Affairs | 26. Taxation |
| 13. Libraries, Archives, and Cultural Resources | 27. Transportation |
| 14. Local Government | 28. Wills, Estates, and Fiduciary Relationships |

User's Guide

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 5
CRIMINAL OFFENSES
(CHAPTERS 1-49 IN VOLUME 3A)

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- 72. WATER AND WATERCOURSES.
- 73. WEAPONS.
- 74. GANGS.
- 75. OPERATION OF AIRCRAFT WHILE INTOXICATED.
- 76. OPERATION OF MOTORBOATS WHILE INTOXICATED.
- 77. OFFICIAL INSIGNIA.
- 78. TOBACCO.
- 79. BODY ARMOR.

Publisher's Notes. Acts 1975, No. 928, which became effective simultaneously with the Arkansas Criminal Code on January 1, 1976, repealed former criminal provisions. Section 2 of that act provided that, although all or part of a statute defining a criminal offense was amended or repealed by the act, the statute or part thereof so amended or repealed would remain in force for the purpose of authorizing the prosecution, conviction and

punishment of a person committing an offense under the statute or part thereof prior to the effective date of the act.

For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1975, No. 280, § 101: effective Jan. 1, 1976.

Acts 1975, No. 928, § 1: effective simultaneously with the Arkansas Criminal Code on Jan. 1, 1976.

CASE NOTES**Purpose.**

Purpose of the 1976 Criminal Code was to eliminate archaic statutes, replace the profusion of overlapping statutes, and de-

velop an evenhanded method of grading offenses. *Brimer v. State*, 295 Ark. 20, 746 S.W.2d 370 (1988).

**SUBTITLE 5. OFFENSES AGAINST THE
ADMINISTRATION OF GOVERNMENT**

**CHAPTER 50
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[Reserved]

**CHAPTER 51
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- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. OFFENSES GENERALLY.
- 3. SABOTAGE PREVENTION ACT.
- 4. COMMUNISTS. [REPEALED.]

RESEARCH REFERENCES

- | | |
|---|---|
| Am. Jur. 70 Am. Jur. 2d, Sedition, § 79 et seq. | Legal Liability for the Exercise of Free Speech , 10 Ark. L. Rev. 155. |
| Ark. L. Rev. The Present Status of the “Clear and Present Danger” Test as Applied to Freedom of Speech, 4 Ark. L. Rev. 52. | C.J.S. 87 C.J.S., Treason, § 1 et seq. |

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-51-201. Treason.
- 5-51-202. Advocating assassination or overthrow of government.
- 5-51-203. Usurping office.
- 5-51-204. Usurping, overturning, or seizing government.
- 5-51-205. Advocating personal injury, destruction of property, or overthrow of government

SECTION.

- Writing or speaking.
- 5-51-206. Advocating personal injury, destruction of property, or overthrow of government
- Use of symbols.
- 5-51-207. Contempt for or desecration of the United States flag.
- 5-51-208. Contempt for or desecration of the Arkansas flag.

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- | | |
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| Cross References. Conviction on testimony of accomplice, § 16-89-111. | Proof of overt acts , § 16-89-112. |
| Fines, § 5-4-201. | Term of imprisonment , § 5-4-401. |

Effective Dates. Acts 1873, No. 15, § 3: effective on passage. Acts 1919, No. 512, § 3: approved Mar. 28, 1919. Emergency declared.
 Acts 1919, No. 64, § 4: approved Feb. 10, 1919. Emergency declared. Acts 1941, No. 292, § 5: effective on passage.

5-51-201. Treason.

- (a) Treason against the state shall consist only in:
 - (1) Levying war against the state; or
 - (2) Adhering to the state's enemies, giving them aid and comfort.
- (b) No person shall be convicted of treason unless on:
 - (1) The testimony of two (2) witnesses to the same overt act; or
 - (2) The person's own confession in open court.
- (c) Treason is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.
- (d) For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-309, 5-4-311, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, and 5-4-608, treason is a Class A felony.

History. Rev. Stat., ch. 44, div. 2, art. 1, §§ 1, 2; C. & M. Dig., §§ 2321, 2322; Pope's Dig., §§ 2947, 2948; Acts 1975, No. 928, § 13; A.S.A. 1947, §§ 41-3951, 41-3952; Acts 2005, No. 1994, § 296. inserted "or her" in (b); and, in (d), deleted "5-4-312," "5-4-505" and "5-4-609" and inserted "5-4-608."

Cross References. Treason, Ark. Const., Art. 2, § 14.

Amendments. The 2005 amendment

5-51-202. Advocating assassination or overthrow of government.

- (a) As used in this section, "government in the United States" means United States Government or the government of the State of Arkansas.
- (b) It is unlawful for any person to:
 - (1) Knowingly advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence or by the assassination of any officer of any government in the United States;
 - (2) Print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence with the intent to cause the overthrow or destruction of any government in the United States;
 - (3) Organize or help to organize any society, group, or assembly of persons that teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence; or
 - (4) Be or become a member of or affiliate with any society, group, or assembly of persons described in subdivision (b)(3) of this section, knowing the purposes of the society, group, or assembly of persons.

(c)(1) Any person who violates any provision of this section is guilty of a Class C felony.

(2) During the five (5) years next following his or her conviction, no person convicted of violating any provision of this section is eligible for employment by the State of Arkansas or by any department or agency of the State of Arkansas.

History. Acts 1941, No. 292, §§ 1, 3; A.S.A. 1947, §§ 41-3957, 41-3958; Acts 2005, No. 1994, § 417.

Amendments. The 2005 amendment deleted “or willfully” following “To knowingly” in (b)(1); redesignated former (b)(3)(A) and (b)(3)(B) as present (b)(3)

and (b)(4); substituted “guilty of a Class C felony” for “deemed guilty of a felony and, upon, conviction, fined not more than ten thousand dollars (\$10,000) or imprisoned for not more than ten (10) years, or both such fine and imprisonment” in (c)(1); and inserted “or her” in (c)(2).

CASE NOTES

Constitutionality.

Former provision of this section disqualifying a person from employment by the state in any capacity because of mem-

bership in a Communistic organization was unconstitutional as it violates U.S. Const. Amend. 1. *Cooper v. Henslee*, 257 Ark. 963, 522 S.W.2d 391 (1975).

5-51-203. Usurping office.

If any person shall exercise or attempt to exercise the duties of any office created by the Arkansas Constitution and laws of this state without first being qualified in the manner prescribed by law for the discharge of the duties, the offender upon conviction is guilty of a Class D felony.

History. Acts 1873, No. 15, § 2, p. 22; C. & M. Dig., § 2848; Pope's Dig., § 3575; A.S.A. 1947, § 41-3956; Acts 2005, No. 1994, § 423.

Amendments. The 2005 amendment

substituted “guilty of a Class D felony” for “punished by imprisonment in the penitentiary for a period not less than one (1) year nor more than five (5) years, in the discretion of the court.”

CASE NOTES

Cited: *Beshear v. Clark*, 292 Ark. 47, 728 S.W.2d 165 (1987).

5-51-204. Usurping, overturning, or seizing government.

Any person who conspires with one (1) or more other persons to usurp the government of the state by force or otherwise, to overturn the government of this state, or to seize any department of the government of this state, evidenced by any act or by forcible attempt to accomplish any purpose stated in this section, commits a Class B felony.

History. Acts 1873, No. 15, § 1, p. 22; C. & M. Dig., § 2844; Pope's Dig., § 3571;

Acts 1975, No. 928, § 14; A.S.A. 1947, § 41-3955.

5-51-205. Advocating personal injury, destruction of property, or overthrow of government — Writing or speaking.

(a) It is unlawful for any person to:

(1) Write, indict, dictate, speak, utter, publish, or declare or be interested in writing, indicting, dictating, speaking, uttering, publishing, or declaring any word, sentence, speech, or article of whatsoever nature or kind, with the intent to encourage, advise, aid, assist, or abet in the infliction of any personal injury upon any person or the taking of human life, or destruction or injury to either public or private property, without due process of law;

(2) Disseminate in any manner knowledge or propaganda that tends to destroy or overthrow the present form of government of either the State of Arkansas or the United States of America by any violence or unlawful means whatsoever; or

(3) Employ any means stated in this section calculated to cause a result stated in this section.

(b) Any person violating a provision of this section is guilty of a Class A misdemeanor.

History. Acts 1919, No. 512, § 1; C. & M. Dig., § 2318; Pope's Dig., § 2944; A.S.A. 1947, § 41-3953; Acts 2005, No. 1994, § 350.

Amendments. The 2005 amendment, in (b), substituted "Class A misdemeanor" for "misdemeanor and, upon conviction,

shall be punished by a fine of not less than ten dollars (\$10.00) nor more than one thousand dollars (\$1,000) and may be imprisoned in the county jail not exceeding six (6) months, or both, at the discretion of the court"; and made a minor stylistic change.

5-51-206. Advocating personal injury, destruction of property, or overthrow of government — Use of symbols.

(a) It is unlawful for any person to wear, use, exhibit, display, or have in possession any symbol, token, device, or flag, the meaning, object, purpose, or intent of which is to encourage, aid, assist, or abet, with such intent, or incite with such intent to, or which is calculated to encourage, aid, assist, abet, or incite any person in:

(1) The infliction of personal injury upon any other person;

(2) The taking of human life;

(3) The destruction of either public or private property without due process of law; or

(4) The destruction or overthrow of, or that which tends to destroy or overthrow, the present form of government of either the State of Arkansas or the United States of America.

(b) Any person violating this section is guilty of a Class A misdemeanor.

History. Acts 1919, No. 512, § 2; C. & M. Dig., § 2319; Pope's Dig., § 2945; A.S.A. 1947, § 41-3954; Acts 2005, No. 1994, § 350.

Amendments. The 2005 amendment,

in (b), substituted "guilty of a Class A misdemeanor" for "deemed guilty of a misdemeanor and, upon conviction, shall be punished by fine of not less than ten dollars (\$10.00) and not more than one

thousand dollars (\$1,000) and may be imprisoned in the county jail not exceeding six (6) months, or both, at the discretion of the court”; and made a minor stylistic change.

5-51-207. Contempt for or desecration of the United States flag.

(a)(1) Any person who knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, “flag of the United States” means any flag of the United States, or any part of a flag of the United States, made of any substance, or any size, in a form that is commonly displayed.

History. Acts 1919, No. 64, §§ 1-3; C. & M. Dig., §§ 2315-2317; Pope’s Dig., §§ 2941-2943; A.S.A. 1947, §§ 41-2971 — 41-2973; Acts 1989, No. 842, § 1; 1989 (3rd Ex. Sess.), No. 75, § 1.
Cross References. Defacing objects of public respect, § 5-71-215.

CASE NOTES

Evidence. Evidence held sufficient to support conviction. *Johnson v. State*, 204 Ark. 476, 163 S.W.2d 153 (1942).

5-51-208. Contempt for or desecration of the Arkansas flag.

(a)(1) Any person who, for profit, knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon an Arkansas flag shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, “Arkansas flag” means any flag of Arkansas, or any part of a flag of Arkansas, made of any substance, or any size, in a form that is commonly displayed.

History. Acts 1995, No. 880, § 1.
Cross References. State flag, § 1-4-101.

SUBCHAPTER 3 — SABOTAGE PREVENTION ACT

SECTION.	SECTION.
5-51-301. Title.	5-51-305. Unlawful entry on property.
5-51-302. Definitions.	5-51-306. Questioning and detaining suspected persons.
5-51-303. Intentional injury to or interference with government property.	5-51-307. Closing and restricting use of highway.
5-51-304. Intentionally defective workmanship.	5-51-308. Witnesses’ privileges.
	5-51-309. Rights of labor not impaired.

Cross References. Defacing public buildings, § 5-71-216.

Effective Dates. Acts 1941, No. 312, § 11: Mar. 26, 1941. Emergency clause provided: "It is found to be a fact that subversive activities threaten in many instances the success of America's defense efforts, a threat that may have already

been extended to Arkansas; Therefore, this Act being necessary for the public peace, health, and safety of the citizens of Arkansas, an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

5-51-301. Title.

This subchapter may be cited as the "Sabotage Prevention Act".

History. Acts 1941, No. 312, § 1A; A.S.A. 1947, § 41-3959.

5-51-302. Definitions.

As used in this subchapter:

(1) "Highway" includes any private or public street, way, or other place used for travel to or from property;

(2) "Highway commissioners" means any individual, board, or other body having authority under then-existing law to discontinue the use of the highway which it is desired to restrict or close to public use and travel; and

(3) "Public utility" includes any pipeline, gas, electric, heat, water, oil, sewer, telephone, telegraph, radio, railway, railroad, airplane, transportation, communication, or other system, owned or operated by anyone for public use.

History. Acts 1941, No. 312, § 1B; A.S.A. 1947, § 41-3960.

5-51-303. Intentional injury to or interference with government property.

Any person who knowingly and intentionally destroys or injures any article or thing belonging to the United States, the State of Arkansas, or any county, city, or other subdivision of this state with intent to hinder or interfere with the owner in the preparation for prosecution of war or in the owner's use for defense purposes is guilty of a Class D felony.

History. Acts 1941, No. 312, § 2; A.S.A. 1947, § 41-3961; Acts 2005, No. 1994, § 424.

Amendments. The 2005 amendment substituted "guilty of a Class D felony" for "punished by imprisonment of not more

than three (3) years or by a fine of not more than one thousand dollars (\$1,000), or by both such fine and imprisonment, at the discretion of the court or jury trying the case."

5-51-304. Intentionally defective workmanship.

Any person who knowingly and intentionally makes or causes to be made any defective article or thing to be used by the United States, the State of Arkansas, or any subdivision of this state with intent to injure or hinder the United States, the State of Arkansas, or any subdivision of this state in the preparation for war, the prosecution of war, or in the United States, the State of Arkansas, or any subdivision of this state's use for defense purposes is guilty of a Class D felony.

History. Acts 1941, No. 312, § 3; A.S.A. 1947, § 41-3962; Acts 2005, No. 1994, § 424.

Amendments. The 2005 amendment substituted "guilty of a Class D felony" for "deemed guilty of a criminal offense and

punished by imprisonment of not more than three (3) years or by a fine of not more than one thousand dollars (\$1,000), or by both fine and imprisonment, in the discretion of the court or jury trying the case."

5-51-305. Unlawful entry on property.

(a) It is unlawful for any person to enter upon the enclosed premises of another without permission of the owner for the purpose of committing an act declared by this subchapter to be unlawful.

(b) Any person who violates the provisions of this section is guilty of a Class C misdemeanor.

History. Acts 1941, No. 312, § 7; A.S.A. 1947, § 41-3964; Acts 2005, No. 1994, § 409.

Amendments. The 2005 amendment substituted "guilty of a Class C misdemeanor" for "deemed guilty of a criminal

offense and punished by imprisonment for not more than ten (10) days or by a fine of not more than fifty dollars (\$50.00), or by both fine and imprisonment, in the discretion of the court or jury trying the case" in (b).

5-51-306. Questioning and detaining suspected persons.

It is not lawful for any private employee acting as a watchperson, guard, or in a supervisory capacity, or any individual, partnership, association, or corporation engaged in the manufacture, production, transportation, or storage of any article or thing described in § 5-51-303 to arrest or detain any person found on any premises to which entry without permission is forbidden by § 5-51-305.

History. Acts 1941, No. 312, § 8; A.S.A. 1947, § 41-3965; Acts 2005, No. 1994, § 316.

Amendments. The 2005 amendment deleted the subsection (a) designation; and deleted former (b) and (c).

5-51-307. Closing and restricting use of highway.

(a) If it becomes necessary for a public highway to be closed to travel for the protection of the public, it is lawful for the prosecuting attorney of the county where the public highway is sought to be closed to apply to the circuit judge for an order closing the public highway, stating in writing the reasons and necessity for the order.

(b) The circuit judge shall cause reasonable notice to be given to all interested parties that the application is made, fixing a time and place for hearing.

(c) All parties interested as landowners or users of the public highway or to be affected by the closing are entitled to be made parties to the cause and heard on the application.

(d) If the circuit judge finds from the evidence that it is reasonable, just, and proper that travel on the public highway should be restricted or prevented, an appropriate order shall be made by the circuit judge to do so, having due regard to the rights of the public and all parties in interest.

(e) Any aggrieved person may appeal from the order as in any other case.

History. Acts 1941, No. 312, § 9; A.S.A. 1947, § 41-3966; Acts 2005, No. 1994, § 259.

Amendments. The 2005 amendment

deleted “chancery court or” preceding “circuit judge” in (a); and substituted “any other case” for “other cases in equity” in (e).

5-51-308. Witnesses’ privileges.

(a) No person is excused from testifying as a witness in any court of competent jurisdiction concerning any thing made unlawful by this subchapter and a person may be compelled to produce any book, paper, or document in his or her possession in connection with his or her testimony or for use at the trial, as is now provided by law.

(b) However, the testimony given by the witness pursuant to subsection (a) of this section or the books, papers, or document produced by him or her pursuant to subsection (a) of this section shall not be used as evidence against him or her, nor form the basis of a criminal charge against him or her.

History. Acts 1941, No. 312, § 6; A.S.A. 1947, § 41-3963.

5-51-309. Rights of labor not impaired.

(a) Nothing in this subchapter shall be construed as impairing, curtailing, or destroying any right of employees and their representatives to self-organization to form, join, or assist labor unions or to bargain collectively through representatives of their own choosing or to engage in concerted activities.

(b) It is not intended by this subchapter that the members of labor unions, their officers and representatives, be deprived of any legal rights which they now have or may have hereafter.

History. Acts 1941, No. 312, § 10; A.S.A. 1947, § 41-3967.

SUBCHAPTER 4 — COMMUNISTS

SECTION.

5-51-401 — 5-51-404. [Repealed.]

Effective Dates. Acts 2003, No. 798, § 2: Mar. 27, 2003. Emergency clause provided: "It is found and determined by the General Assembly that Arkansas Code §§ 5-51-401 through 5-51-404 have never been enforced; that these sections of the Arkansas Code are of dubious validity under the First Amendment to the United States Constitution; that litigation is currently pending challenging the constitutionality of these unenforced sections of the Arkansas Code; and this act is immediately necessary because the state wishes to avoid any liability for attorneys'

fees or costs as a result of the litigation. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-51-401 — 5-51-404. [Repealed.]

Publisher's Notes. This subchapter, concerning the Communist Party, prohibitions on party operation and membership, and registration requirements, was repealed by Acts 2003, No. 798, § 1. The subchapter was derived from the following sources:

5-51-401. Acts 1961, No. 15, § 1; A.S.A. 1947, § 41-3971.

5-51-402. Acts 1961, No. 15, § 2; A.S.A. 1947, § 41-3972.

5-51-403. Acts 1961, No. 15, §§ 3, 4; A.S.A. 1947, §§ 41-3973, 41-3974.

5-51-404. Acts 1951, No. 401, §§ 1-3; 1975, No. 928, § 16; A.S.A. 1947, §§ 41-3968 - 41-3970.

CHAPTER 52

CORRUPTION IN PUBLIC OFFICE

SECTION.

5-52-101. Abuse of public trust.

5-52-102, 5-52-103. [Repealed.]

5-52-104. Soliciting unlawful compensation.

5-52-105. Attempt to influence a public servant.

SECTION.

5-52-106. Misuse of confidential information.

5-52-107. Abuse of office.

5-52-108. Compensation for speeches and appearances.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Effective Dates. Init. Meas. 1990, No.

1, § 9: Dec. 7, 1990, except that §§ 1, 2, 3(e) and (j), (4), and § 7-6-215 of § 6 shall become effective on Nov. 7, 1990.

RESEARCH REFERENCES

Am. Jur. 12 Am. Jur. 2d, Bribery, § 15 et seq.

63C Am. Jur. 2d, Pub. Off., § 369 et seq.

Ark. L. Rev. Official Misconduct Under the Arkansas Criminal Code, 30 Ark. L. Rev. 160.

C.J.S. 11 C.J.S., Bribery, § 3.

67 C.J.S., Officers, § 332 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-52-101. Abuse of public trust.

(a) A person commits the offense of abuse of public trust if the person:

(1) Solicits, accepts, or agrees to accept on behalf of any person, political party, or other organization any benefit from another person upon an agreement or understanding that the other person will or may be appointed a public servant or designated or nominated as a candidate for public office;

(2) Offers, confers, or agrees to confer any benefit and the receipt of the benefit is prohibited by this section;

(3) Solicits, accepts, or agrees to accept any benefit as compensation or consideration for having as a public servant given a decision, opinion, recommendation, or vote favorable to another or for having otherwise exercised his or her discretion in favor of another; or

(4) Offers, confers, or agrees to confer any benefit upon a public servant and the receipt of the benefit is prohibited by this section.

(b) It is not a defense to a prosecution under this section that the decision, opinion, recommendation, vote, or use of discretion, except for the benefit, was otherwise proper.

(c) Abuse of public trust is a Class D felony.

History. Acts 1975, No. 280, § 2701; A.S.A. 1947, § 41-2701; Acts 2005, No. 1994, § 328.

Amendments. The 2005 amendment substituted “abuse of public trust” for “trading in public office” in (a); inserted “or

she” in (a)(1) and (a)(2); inserted present (a)(3), (a)(4), and (b); redesignated former (b) as present (c); and, in present (c), substituted “Abuse of public trust is a Class D felony” for “Trading in public office is a Class A misdemeanor.”

CASE NOTES

Cited: McCuen v. State, 328 Ark. 46, 941 S.W.2d 397 (1997).

5-52-102, 5-52-103. [Repealed.]

Publisher’s Notes. These sections, concerning unlawful compensation for past official action and public servant bribery, were repealed by Acts 2005, No. 1994, § 531. The sections were derived from the following sources:

5-52-102. Acts 1975, No. 280, § 2702; A.S.A. 1947, § 41-2702.

5-52-103. Acts 1975, No. 280, § 2703; A.S.A. 1947, § 41-2703.

5-52-104. Soliciting unlawful compensation.

(a) A person commits the offense of soliciting unlawful compensation if he or she requests a benefit for the performance of an official action as a public servant knowing that he or she is required to perform that action:

(1) Without compensation, other than authorized salary or allowances; or

(2) At a level of compensation lower than that requested.

(b) Soliciting unlawful compensation is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2704;
A.S.A. 1947, § 41-2704.

CASE NOTES

Cited: *Gaines v. McCuen*, 296 Ark. 513,
758 S.W.2d 403 (1988).

5-52-105. Attempt to influence a public servant.

(a) A person commits the offense of attempting to influence a public servant if he or she threatens violence or economic reprisal against any person or uses deceit with the purpose to alter or affect a public servant's decision, vote, opinion, or action concerning any matter which is afterwards to be considered or performed by the public servant or the agency or body of which the public servant is a member.

(b) Attempt to influence a public servant is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2705;
A.S.A. 1947, § 41-2705.

CASE NOTES

Cited: *Gaines v. McCuen*, 296 Ark. 513,
758 S.W.2d 403 (1988).

5-52-106. Misuse of confidential information.

(a) A public servant commits the offense of misuse of confidential information if, in contemplation of official action by himself or herself or a governmental unit with which he or she is associated or in reliance on information to which he or she has access in his or her official capacity and which has not been made public, the public servant:

(1) Acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or

(2) Speculates or aids another to speculate on the basis of the information.

(b) Misuse of confidential information is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2706;
A.S.A. 1947, § 41-2706.

5-52-107. Abuse of office.

(a) A person commits the offense of abuse of office if, being a public servant and with the purpose of benefiting in a pecuniary fashion himself or herself or another person or of harming another person, the person knowingly:

(1) Commits an unauthorized act which purports to be an act of his or her office; or

(2) Omits to perform a duty imposed on him or her by law or clearly inherent in the nature of his or her office.

(b) Abuse of office is a Class B misdemeanor.

History. Acts 1975, No. 280, § 2707;
A.S.A. 1947, § 41-2707.

5-52-108. Compensation for speeches and appearances.

(a) Except for the compensation a member of the General Assembly is entitled to from the State of Arkansas for the performance of his or her duties, no member shall solicit or accept compensation for speeches or other appearances before a group of persons unless the appearance is made as part of the normal course of business in the legislative member's private occupation.

(b) For the purpose of this section, "compensation" means any money or anything of value received or to be received as a claim for services, whether in the form of a retainer, fee, salary, expense, allowance, honorarium, forbearance, forgiveness, interest, dividend, royalty, rent, or any other form of recompense or any combination thereof. "Compensation" does not include payments received for food, lodging, or travel which bears a relationship to a legislative member's office when such member is appearing in an official capacity.

(c) Any person who knowingly or willfully violates this section shall upon conviction be guilty of a Class A misdemeanor.

History. Init. Meas. 1990, No. 1, § 8;
2005, No. 1994, § 221.

Amendments. The 2005 amendment,
in (c), substituted "guilty of a Class A

misdemeanor" for "fined an amount not to exceed one thousand dollars (\$1,000) or be imprisoned for not more than one (1) year, or both."

CHAPTER 53

OFFENSES RELATING TO JUDICIAL AND OTHER OFFICIAL PROCEEDINGS

SUBCHAPTER

1. GENERAL PROVISIONS.

2. THREATENING A JUDICIAL OFFICIAL OR JUROR.

A.C.R.C. Notes. References to "this chapter" in §§ 5-53-101 — 5-53-133 may not apply to § 5-53-134 which was enacted subsequently.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Cross References. Charge of false swearing deemed slander, § 5-15-103.

False statement in report of fees, § 21-7-201.

Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1871, No. 31, § 7: effective 30 days after passage.

Acts 1941, No. 365, § 5: effective on passage.

Acts 1991, No. 267, § 5: Feb. 28, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that since the recent court decision in *Bates v. Bates*, this state has lacked adequate remedies for dealing with domestic violence and abuse; that the problem of domestic violence and abuse in our society is so complex that proper judicial remedies for victims and potential victims transcend the traditional jurisdictions of circuit and mu-

nicipal court; that immediate intervention through arrest upon probable cause to protect the victim from physical injury is one remedy which should be provided in this state as in other states; that every potential remedy should be made available to members of households who have been subjected to abuse or are likely to be subjected to abuse such as to create the crime of violation of an order of protection. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect upon its passage and approval."

Acts 1991, No. 1236, § 5: Apr. 10, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 267 of 1991 is in need of a technical correction; Act 267 of 1991 went into effect on February 28, 1991, and therefore this act should go into effect immediately in order to clarify the law as soon as possible. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action. 4 ALR 4th 829.

Statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 ALR 4th 769.

Sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR 4th 888.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror. 39 ALR 4th 800.

Attorney acting for client: Liability for malicious prosecution. 46 ALR 4th 249.

Am. Jur. 12 Am. Jur. 2d, Bribery, § 1 et seq.

52 Am. Jur. 2d, Mal. Pros., § 7.

58 Am. Jur. 2d, Obst. Jus., § 1 et seq.

60A Am. Jur. 2d, Perjury, § 1 et seq.

C.J.S. 11 C.J.S., Bribery, § 1 et seq.

54 C.J.S., Mal. Pros., § 1 et seq.

67 C.J.S., Obst. Jus., § 1 et seq.

70 C.J.S., Perjury, § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-53-101. Definitions.

5-53-102. Perjury generally.

5-53-103. False swearing generally.

5-53-104. Perjury — Retraction.

SECTION.

5-53-105. Perjury or false swearing — Oath.

5-53-106. Perjury or false swearing — Inconsistent statements.

SECTION.

- 5-53-107. Perjury or false swearing — Proof.
 5-53-108. Witness bribery.
 5-53-109. Intimidating a witness.
 5-53-110. Tampering.
 5-53-111. Tampering with physical evidence.
 5-53-112. Retaliation against a witness, informant, or juror.
 5-53-113. Juror bribery.
 5-53-114. Intimidating a juror, a witness, or an informant.
 5-53-115. Jury tampering.

SECTION.

- 5-53-116. Simulating legal process.
 5-53-117 — 5-53-129. [Reserved.]
 5-53-130. [Repealed.]
 5-53-131. Frivolous, groundless, or malicious prosecutions.
 5-53-132. Misconduct in selecting or summoning jurors.
 5-53-133. Approaching jury commissioners to influence juror selections.
 5-53-134. Violation of an order of protection.

Publisher's Notes. Because of the enactment of Subchapter 2 of this chapter by Acts 2003, No. 1313, the provisions of this

chapter existing before that act have been designated as Subchapter 1.

5-53-101. Definitions.

As used in this subchapter:

(1)(A) "False material statement" means any false statement, regardless of its admissibility under the rules of evidence, which affects or could affect the course or outcome of an official proceeding or the action or decision of a public servant in the performance of any governmental function.

(B) Whether a false statement is material in a given factual situation is a question of law;

(2)(A) "Juror" means a member of any jury, including a grand jury and a petit jury.

(B) "Juror" also includes any person who has been drawn or summoned as a prospective juror;

(3)(A) "Oath" means swearing, affirming, and any other mode authorized by law of attesting to the truth of that which is stated.

(B) A written statement is treated as if made under oath if the written statement:

(i) Was made on or pursuant to a form bearing notice, authorized by law, to the effect that a false statement made pursuant to the form is punishable;

(ii) Recites that it was made under oath, and the declarant was aware of the recitation at the time he or she signed the written statement and intended that the written statement should be considered a sworn statement; or

(iii) Is made, used, or offered with the purpose that it be accepted as compliance with a statute, rule, or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement;

(4)(A) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency or

official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions in any such proceeding.

(B) "Official proceeding" includes the signing or marking, under oath, of:

- (i) A voter registration application;
- (ii) An application for absentee ballot; or
- (iii) A precinct voter registration list;

(5) "Testimony" includes an oral or written statement, document, or any other material that is or could be offered by a witness in an official proceeding;

(6) "Threat" means a menace, however communicated, to:

(A) Use physical force against any person; or

(B) Harm substantially any person with respect to his or her property, health, safety, business, calling, career, financial condition, reputation, or a personal relationship; and

(7)(A) "Witness" means:

(i) Any person for whose attendance to give testimony at an official proceeding any process has issued; or

(ii) Any person who is holding or plans to hold himself available to give testimony at an official proceeding.

(B) For the purpose of this code, a person is a "witness" if testimony is sought or offered by personal attendance at an official proceeding or by deposition or affidavit.

History. Acts 1975, No. 280, § 2601; A.S.A. 1947, § 41-2601; Acts 1995, No. 927, § 1; 1995, No. 938, § 1; 2003, No. 1185, § 5.

Amendments. The 2003 amendment

substituted "grand and petit juries" for "grand, petit, coroner's, justice of the peace, or chancery court juries" in (a)(1).

Meaning of "this code". See note at § 5-1-101.

CASE NOTES

ANALYSIS

Evidence.

Oath.

Official proceeding.

Evidence.

Substantial evidence supported defendant's conviction for intimidating a witness where, after learning that the witness told police that she observed defendant's son commit murder, defendant threatened to kill the witness, burn her house down and harm her children; the trial court, sitting as the finder of fact, could have found that defendant threatened the witness with the purpose of influencing her testimony or inducing her not to testify. *Reed v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 452 (June 8, 2005).

Oath.

Where affidavit stated that it was subscribed and sworn to before municipal judge and the judge questioned the witness about the content of the affidavit, asked if the statements therein were true, and had witness sign in his presence, it was unimportant that the judge did not require the witness to raise his right hand and state orally that the statements in the affidavit were "the truth, the whole truth, and nothing but the truth, so help me God" and the affidavit was properly sworn to under oath. *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983).

Official Proceeding.

Statement by the witness given under oath to the deputy prosecuting attorney held to be given in an official proceeding.

Slavens v. State, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Cited: Fleming v. State, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

5-53-102. Perjury generally.

(a) A person commits perjury if in any official proceeding he or she makes a false material statement, knowing it to be false, under an oath required or authorized by law.

(b) Lack of knowledge of the materiality of the statement is not a defense to a charge of perjury.

(c) Perjury is a Class C felony.

History. Acts 1975, No. 280, § 2602; A.S.A. 1947, § 41-2602.

CASE NOTES

ANALYSIS

In general.

Evidence.

Indictment or information.

Instructions.

Material statements.

Official proceeding.

Persons chargeable.

Withdrawn guilty pleas.

In General.

Perjury was an offense against the sovereign whose law was violated by the making of the false oath. *State v. Kirkpatrick*, 32 Ark. 117 (1877) (decision under prior law).

Evidence.

Prior inconsistent statement by the witness, given under oath to the deputy prosecuting attorney, was admissible for its substantive content and, the witness was subject to perjury penalties under this section. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Conviction for the crime of perjury must be based upon the testimony of at least one witness plus corroborating evidence; the corroborating evidence must go to material testimony adduced by the State and not the testimony on some immaterial matter. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

Indictment or Information.

An indictment for perjury was not required to charge in haec verba that the false testimony was material if it stated facts from which its materiality resulted as a legal conclusion. *State v. Nees*, 47

Ark. 553, 2 S.W. 184 (1886) (decision under prior law).

For cases discussing the sufficiency of indictments or informations, see *Blevins v. State*, 85 Ark. 195, 107 S.W. 393 (1908); *Smith v. State*, 91 Ark. 200, 120 S.W. 985 (1909); *Loudermilk v. State*, 110 Ark. 549, 162 S.W. 569 (1913); *Claborn v. State*, 115 Ark. 387, 171 S.W. 862 (1914); *Davis v. State*, 131 Ark. 542, 199 S.W. 902 (1917); *Cockrum v. State*, 186 Ark. 14, 52 S.W.2d 642 (1932); *Balentine v. State*, 259 Ark. 590, 535 S.W.2d 221 (1976) (preceding decisions under prior law).

In indictments for perjury, the falsity of the testimony or statement for which the defendant was indicted could be shown by the indictment to be material either by direct averment or by allegations from which the materiality appeared. *Cockrum v. State*, 186 Ark. 14, 52 S.W.2d 642 (1932) (decision under prior law).

Instructions.

Failure to charge the jury that a conviction could not be had save on the testimony of two credible witnesses or on that of one witness corroborated by other evidence could not be complained of unless the appellant asked for an instruction on that point. *Scott v. State*, 77 Ark. 455, 92 S.W. 241 (1906) (decision under prior law).

Material Statements.

Perjury consisted in false and corrupt testimony relating not only to the main fact in issue, but also to material circumstances tending to prove the issue. *Nelson v. State*, 32 Ark. 192 (1877) (decision under prior law).

The materiality of the testimony alleged to be perjury had to be established by evidence and not left to presumption or inference. *Nelson v. State*, 32 Ark. 192 (1877); *Marvin v. State*, 53 Ark. 395, 14 S.W. 87 (1890) (preceding decisions under prior law).

Questions held to be material and false answers thereto would sustain an indictment for perjury. *Lewis v. State*, 78 Ark. 567, 94 S.W. 613 (1906) (decision under prior law).

False testimony not tending to prove a material issue in the case held not to constitute perjury. *Reidhar v. State*, 86 Ark. 525, 111 S.W. 1127 (1908) (decision under prior law).

In an investigation before a grand jury, any testimony was material whose necessary effect was to suspend, if not prevent, further investigation of a subject of inquiry. *Smith v. State*, 91 Ark. 200, 120 S.W. 985 (1909) (decision under prior law).

Where the undisputed evidence in a perjury case showed that the alleged false matters sworn to were material, the failure of the court to instruct the jury that the alleged false evidence had to be shown to be not only false but also material to the issue was not error. Where there was no dispute as to the facts sworn to, the question of materiality was for the court. *Brooks v. State*, 91 Ark. 505, 121 S.W. 740 (1909); *Barre v. State*, 99 Ark. 629, 139 S.W. 641 (1911) (preceding decisions under prior law).

In perjury cases it was not necessary that the false testimony would tend directly to prove the particular issue in the trial in which it was given, but if it was circumstantially material or tended to support or give credit to witnesses with respect to the main fact or to discredit a witness, it was sufficient to constitute the basis of the charge. *Harris v. State*, 119 Ark. 408, 177 S.W. 1144 (1915) (decision under prior law).

The materiality of the statements in an affidavit was not an essential element of perjury. *Williams v. State*, 259 Ark. 667, 535 S.W.2d 842 (1976) (decision under prior law).

If the false statement is material to the

issue being tried, it does not matter whether the defendant is guilty or innocent of the collateral charge being tried or whether the State's evidence may fail in its proof; it is only necessary that the false statement be capable of influencing the outcome of the proceedings. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

Testimony held to be material. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

Official Proceeding.

Giving false testimony in a trial before a police court was perjury. *Gardner v. State*, 80 Ark. 264, 97 S.W. 48 (1906) (decision under prior law).

Perjury could not be assigned on an affidavit for appeal from justice of the peace. *Jackson v. State*, 90 Ark. 577, 119 S.W. 1129 (1909) (decision under prior law).

Statement by a witness given under oath to deputy prosecuting attorney was given at an official proceeding. *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981).

Persons Chargeable.

One who induced his wife to make a false affidavit was not guilty of perjury. *Thomas v. State*, 149 Ark. 68, 231 S.W. 200 (1921) (decision under prior law).

Withdrawn Guilty Pleas.

Rule 410 of the Uniform Rules of Evidence is intended to protect an accused who has been permitted to withdraw a plea of guilty in accordance with ARCrP 25 from having his guilty plea used against him as an admission against interest when he is tried on those same charges; it does not render the defendants' guilty pleas privileged from a prosecution for perjury where the defendants later filed motions to withdraw their guilty pleas and testified that they had lied at the hearing on their guilty pleas. *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986).

Cited: *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986); *In re Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992).

5-53-103. False swearing generally.

(a) A person commits false swearing if other than in an official proceeding he or she makes a false material statement, knowing it to be false, under an oath required or authorized by law.

(b) Lack of knowledge of the materiality of the statement is not a defense to a charge of false swearing.

(c) False swearing is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2603;
A.S.A. 1947, § 41-2603.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law,
Criminal Law, 1 UALR L.J. 153.

CASE NOTES**Charge.**

Factual question not resolved as to whether probable cause existed to charge defendant with false swearing or theft by

deception. *First Com. Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172 (1987).

Cited: *Hester v. Langston*, 297 Ark. 87, 759 S.W.2d 797 (1988).

5-53-104. Perjury — Retraction.

(a) It is a defense to a prosecution for perjury that the defendant retracted his or her false material statement:

(1) In a manner showing a complete and voluntary retraction of the statement;

(2) During the course of the same official proceeding in which the statement was made; and

(3) Before the subject matter of the official proceeding was submitted to the ultimate trier of fact.

(b) A statement made in a separate hearing at a separate stage of the same case or administrative proceeding is deemed to have been made in the course of the same proceeding.

(c) Any person who in making a retraction causes termination of any official proceeding by reason of prejudice to a legal right of a party to the official proceeding is guilty of a Class A misdemeanor.

History. Acts 1975, No. 280, § 2606;
A.S.A. 1947, § 41-2606.

CASE NOTES**Stages of Same Proceeding.**

While subsection (b) of this section provides that separate stages of the same case shall be deemed to have been made in the course of the same proceeding, the hearing on plea withdrawal and the hear-

ing on the accepted guilty pleas were not part of the same proceeding when the previous phase ended with the acceptance of the guilty pleas. *Brown v. State*, 288 Ark. 517, 707 S.W.2d 313 (1986).

5-53-105. Perjury or false swearing — Oath.

It is no defense to a prosecution under §§ 5-53-102 and 5-53-103 that:

- (1) The oath was administered or taken in an irregular manner; or
- (2) The person administering the oath lacked authority to administer the oath if the taking of the oath was required by law.

History. Acts 1975, No. 280, § 2607;
A.S.A. 1947, § 41-2607.

5-53-106. Perjury or false swearing — Inconsistent statements.

(a) When a person charged with perjury or false swearing has made inconsistent material statements under oath and affecting the same matter or transaction, all the several inconsistent material statements may be charged in different counts of the same indictment or information.

(b) Proof of the inconsistency of statements is of itself evidence that one (1) of the statements is false, and it is not necessary to sustain a conviction to establish which statement is false.

(c) If one (1) inconsistent statement, if false, would constitute perjury and the other inconsistent statement, if false, would constitute only false swearing, the defendant may be convicted only of false swearing.

(d) Nothing in this section prevents a conviction of perjury when proof of perjury is established by evidence other than proof of inconsistent statements.

History. Acts 1975, No. 280, § 2604;
A.S.A. 1947, § 41-2604.

CASE NOTES

Cited: *Fleming v. State*, 14 Ark. App. State, 288 Ark. 517, 707 S.W.2d 313 205, 686 S.W.2d 803 (1985); *Brown v.* (1986).

5-53-107. Perjury or false swearing — Proof.

Except for a prosecution based upon inconsistent statements, in any prosecution for perjury or false swearing falsity of a statement may not be established solely through contradiction by the uncorroborated testimony of a single witness.

History. Acts 1975, No. 280, § 2605;
A.S.A. 1947, § 41-2605.

CASE NOTES**Corroboration.**

Conviction for the crime of perjury must be based upon the testimony of at least one witness plus corroborating evidence; the corroborating evidence must go to ma-

terial testimony adduced by the state and not the testimony on some immaterial matter. *Fleming v. State*, 14 Ark. App. 205, 686 S.W.2d 803 (1985).

5-53-108. Witness bribery.

(a) A person commits witness bribery if he or she:

(1) Offers, confers, or agrees to confer any benefit upon a witness or a person he or she believes may be called as a witness with the purpose of:

(A) Influencing the testimony of that person;

(B) Inducing that person to avoid legal process summoning that person to testify; or

(C) Inducing that person to absent himself or herself from an official proceeding to which that person has been legally summoned;

or

(2) Solicits, accepts, or agrees to accept any benefit and the conferring of the benefit is prohibited by this section.

(b) Witness bribery is a Class C felony.

History. Acts 1975, No. 280, § 2608;
A.S.A. 1947, § 41-2608.

RESEARCH REFERENCES

UALR L.J. Perroni & McNutt, Criminal Contingency Fee Agreements: How Fair Are They?, 16 UALR L.J. 211.

CASE NOTES**ANALYSIS**

Evidence.

Indictment or information.

Testimony pursuant to plea bargain.

Evidence.

Evidence held sufficient to support conviction. *Kerr v. State*, 256 Ark. 738, 512 S.W.2d 13 (1974), cert. denied, 419 U.S. 1110, 95 S. Ct. 783, 42 L. Ed. 2d 806 (1975) (decision under prior law).

Indictment or Information.

Indictment held to be sufficient. *Kirkpatrick v. State*, 177 Ark. 1124, 9 S.W.2d 574 (1928) (decision under prior law).

Testimony pursuant to plea bargain.

The trial court properly denied a motion in limine in a murder prosecution which sought to exclude the testimony of a copерpetrator who had entered into a plea agreement with the state which was conditioned upon his truthful testimony at the defendant's trial on the basis that such testimony would be the result of witness bribery. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999).

Cited: *Clark v. State*, 291 Ark. 405, 725 S.W.2d 550 (1987).

5-53-109. Intimidating a witness.

(a) A person commits the offense of intimidating a witness if he or she threatens a witness or a person he or she believes may be called as a witness with the purpose of:

(1) Influencing the testimony of that person;

(2) Inducing that person to avoid legal process summoning that person to testify; or

(3) Inducing that person to absent himself or herself from an official proceeding to which that person has been legally summoned.

(b) Intimidating a witness is a Class C felony.

History. Acts 1975, No. 280, § 2609;
A.S.A. 1947, § 41-2609.

CASE NOTES

Evidence.

Evidence held sufficient to enable court to find defendant guilty of intimidating witness with a threat of physical force or substantial harm if he testified in criminal proceedings. *McCraw v. State*, 24 Ark. App. 48, 748 S.W.2d 36 (1988).

Substantial evidence supported defendant's conviction for intimidating a witness where, after learning that the witness told police that she observed

defendant's son commit murder, defendant threatened to kill the witness, burn her house down and harm her children; the trial court, sitting as the finder of fact, could have found that defendant threatened the witness with the purpose of influencing her testimony or inducing her not to testify. *Reed v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 452 (June 8, 2005).

5-53-110. Tampering.

(a) A person commits the offense of tampering if, believing that an official proceeding or investigation is pending or about to be instituted, he or she induces or attempts to induce another person to:

(1) Testify or inform falsely;

(2) Withhold any unprivileged testimony, information, document, or thing regardless of the admissibility under the rules of evidence of the testimony, document, or thing and notwithstanding the relevance or probative value of the information or thing to an investigation;

(3) Elude legal process summoning that person to testify or supply evidence, regardless of whether the legal process was lawfully issued; or

(4) Absent himself or herself from any proceeding or investigation to which that person has been summoned.

(b) Tampering is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2610;
A.S.A. 1947, § 41-2610.

RESEARCH REFERENCES

ALR. Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 ALR 5th 61.

Effect of spoliation of evidence in products liability action. 102 ALR 5th 99.

CASE NOTES

ANALYSIS

Applicability.

False testimony.

Applicability.

Criminal statutes prohibiting tampering with evidence do not impose a duty upon an employer to preserve component

parts of a machine which are needed for an employee injured by the machine to maintain an action against the manufacturer of the machine. *Wilson v. Beloit Corp.*, 725 F. Supp. 1056 (W.D. Ark. 1989), *aff'd*, 921 F.2d 765 (8th Cir. 1990).

False Testimony.

A contract by one person to furnish

another any kind of proof that would help him win his case, regardless of whether the testimony was to be true or false, contemplated subornation of perjury. *Luce v. Endsley*, 145 Ark. 287, 224 S.W. 619 (1920) (decision under prior law).

One who induced his wife to make a false affidavit could be guilty of suborna-

tion of perjury by inducing her to commit willful and corrupt perjury, and he could not be found guilty unless the wife knew that the statements in the affidavit were false. *Thomas v. State*, 149 Ark. 68, 231 S.W. 200 (1921) (decision under prior law).

Cited: *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990).

5-53-111. Tampering with physical evidence.

(a) A person commits the offense of tampering with physical evidence if he or she alters, destroys, suppresses, removes, or conceals any record, document, or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation.

(b)(1) Tampering with physical evidence is a Class D felony if the person impairs or obstructs the prosecution or defense of a felony.

(2) Otherwise, tampering with physical evidence is a Class B misdemeanor.

History. Acts 1975, No. 280, § 2611; A.S.A. 1947, § 41-2611.

RESEARCH REFERENCES

ALR. Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 ALR 5th 61.

Effect of spoliation of evidence in products liability action. 102 ALR 5th 99.

Ark. L. Rev. Note, Altered or Absent Evidence: The Tort of Spoliation: *Wilson v. Beloit Corp.*, 43 Ark. L. Rev. 453.

CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Double jeopardy.

Evidence.

Intent.

Misdemeanor.

Constitutionality.

The mere existence of overlapping provisions in this section and § 5-54-105 does not render either statute constitutionally infirm; there appears to be no impermissible uncertainty in the definitions of the respective offenses. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

Applicability.

Criminal statutes prohibiting tampering with evidence do not impose a duty upon an employer to preserve component parts of a machine which are needed for an employee injured by the machine to

maintain an action against the manufacturer of the machine. *Wilson v. Beloit Corp.*, 725 F. Supp. 1056 (W.D. Ark. 1989), *aff'd*, 921 F.2d 765 (8th Cir. 1990).

Double Jeopardy.

Where the charges of breaking or entering and tampering with physical evidence were based upon the same elements, the two felonies were merged into one, and defendant could only be convicted of one offense; thus, defendant's conviction for tampering with physical evidence was affirmed and his conviction for breaking or entering was reversed and dismissed. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

Evidence.

Evidence held sufficient to support conviction. *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

Intent.

Evidence held sufficient to support a

finding of intent to tamper with the evidence. *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

a felony as prohibited by this section, so conviction had to be reduced to misdemeanor tampering with evidence. *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

Misdemeanor.

Evidence held insufficient to find that the defendant impaired the prosecution of

Cited: *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990).

5-53-112. Retaliation against a witness, informant, or juror.

(a) A person commits the offense of retaliation against a witness, informant, or juror if he or she harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of witness, informant, or juror.

(b) Retaliation against a witness, informant, or juror is a Class D felony.

(c) “Informant” means a person who provides information to any law enforcement agency in an effort to assist the law enforcement agency in solving a crime or apprehending a person suspected of a criminal offense.

History. Acts 1975, No. 280, § 2612; A.S.A. 1947, § 41-2612; Acts 1997, No. 1238, § 1; 2005, No. 1994, § 465.

who is recognized as such by the county sheriff, the chief of police of a first or second class city, an officer of the State Police, or any of their respective designees” in (b); and rewrote (c).

Amendments. The 2005 amendment inserted “or she” in (a); substituted “informant, a juror, or a witness” for “informant

RESEARCH REFERENCES

Ark. L. Notes. Flaccus, The Employment-at-Will Doctrine — The Report of Its Death Has Been Much Exaggerated, 1989 Ark. L. Notes 15.

at Will — Public Policy Exception Recognized, *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), 11 UALR L.J. 617.

UALR L.J. Note, Labor — Employment

CASE NOTES

ANALYSIS

Applicability.
Public policy.

Applicability.

The public policy exception to the at-will-employment doctrine does not embrace the claim of an employee fired for threatening to undermine an employer’s

private, contractual relationships. *Skrable v. Saint Vincent Infirmary*, 57 Ark. App. 164, 943 S.W.2d 236 (1997).

Public Policy.

Public policy of the state is contravened if an employer discharges an employee for reporting a violation of state or federal law. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988).

5-53-113. Juror bribery.

(a) A person commits juror bribery if he or she:

(1) Offers, confers, or agrees to confer any benefit upon a juror with the purpose of influencing the juror’s vote, decision, or other action as a juror; or

(2) Solicits, accepts, or agrees to accept any benefit and the receipt of the benefit is prohibited by this section.

(b) Juror bribery is a Class C felony.

History. Acts 1975, No. 280, § 2613; A.S.A. 1947, § 41-2613.

5-53-114. Intimidating a juror, a witness, or an informant.

(a) A person commits the offense of intimidating a juror, a witness, or an informant if he or she threatens a juror, a witness, or an informant with the purpose of influencing the juror's vote or decision or the witness's or informant's statement or testimony.

(b) Intimidating a juror, a witness, or an informant is a Class C felony.

(c) "Informant" means a person who provides information to any law enforcement agency in an effort to assist the law enforcement agency in solving crimes and apprehending persons suspected of criminal offenses.

History. Acts 1975, No. 280, § 2614; A.S.A. 1947, § 41-2614; Acts 2005, No. 1994, § 466.

Amendments. The 2005 amendment substituted "juror, a witness, or an infor-

mant" for "juror" throughout this section; in (a), inserted "or she," substituted "the witness's or informant's statement or testimony" for "other action as a juror" and made a related change; and added (c).

5-53-115. Jury tampering.

(a) A person commits the offense of jury tampering if he or she attempts directly or indirectly to communicate with a juror, other than as a part of the official proceedings in which the juror is participating, with the purpose of influencing the juror's vote, decision, or other action as a juror.

(b) Juror tampering is a Class D felony.

History. Acts 1975, No. 280, § 2615; A.S.A. 1947, § 41-2615.

CASE NOTES

Civil Remedy.

The former jury tampering statute was not intended to also create a civil remedy and such a remedy could not be implied. *Jones v. United States*, 401 F. Supp. 168

(E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S. Ct. 735, 50 L. Ed. 2d 750 (1977) (decision under prior law).

5-53-116. Simulating legal process.

(a) A person commits the offense of simulating legal process if, with the purpose of obtaining anything of value, he or she knowingly delivers or causes to be delivered to another a request, demand, or notice that simulates any legal process issued by any court of this state.

(b) Simulating legal process is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2616; A.S.A. 1947, § 41-2616.

5-53-117 — 5-53-129. [Reserved.]

5-53-130. [Repealed.]

Publisher's Notes. This section, concerning indictments for perjury, was repealed by Acts 2005, No. 1994, § 542. The section was derived from Rev. Stat., ch. 44,

div. 5, art. 1, § 7; C. & M. Dig., § 2590; Pope's Dig., § 3278; A.S.A. 1947, § 41-2657.

5-53-131. Frivolous, groundless, or malicious prosecutions.

Any officer or any person who knowingly brings or aids and encourages another to bring a frivolous, groundless, or malicious prosecution is guilty of a Class A misdemeanor.

History. Acts 1871, No. 31, § 5, p. 96; C. & M. Dig., § 2765; Pope's Dig., § 3470; A.S.A. 1947, § 41-2651; Acts 2005, No. 1994, § 452.

Amendments. The 2005 amendment inserted "knowingly" and "Class A."

Cross References. False imprisonment, §§ 5-11-103, 5-11-104.

CASE NOTES

Applicability.

Statute making it a misdemeanor for an officer to bring or aid others to bring malicious prosecutions is a criminal stat-

ute and does not apply to torts committed by city officers. *Springfield v. Carter*, 175 F.2d 914 (8th Cir. 1949).

5-53-132. Misconduct in selecting or summoning jurors.

Any person whose duty it is to select or summon any jurors in any court or before any officer who is guilty of any unlawful, partial, or improper conduct in selecting or summoning any juror is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100).

History. Rev. Stat., ch. 44, div. 5, art. 2, § 5; C. & M. Dig., § 2565; Pope's Dig., § 3245; A.S.A. 1947, § 41-2652; Acts 2005, No. 1994, § 50.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor."

5-53-133. Approaching jury commissioners to influence juror selections.

(a)(1) It is unlawful for any person to approach any jury commissioner for the purpose of having any person placed upon a grand jury or petit jury after the circuit judges of any district in this state have appointed jury commissioners to select grand jurors and petit jurors to serve in the circuit courts of this state.

(2) Any person violating this subsection is guilty of a Class D felony.

(b) If any state, county, city, or township official approaches any jury commissioner for the purpose of having any person placed upon the grand jury or petit jury, he or she is guilty of a Class D felony.

(c) If any licensed attorney approaches any jury commissioner for the purpose of having any person placed upon the grand jury or petit jury, he or she is guilty of a Class D felony.

(d) It is the duty of the circuit judges to instruct jury commissioners in regard to the provisions of this section.

History. Acts 1941, No. 365, §§ 1-4; 1951, No. 358, §§ 4-6; A.S.A. 1947, §§ 41-2653 — 41-2656; Acts 1995, No. 1296, § 6; 2005, No. 1994, § 425.

Amendments. The 2005 amendment substituted “Class D felony” for “felony and upon conviction shall be imprisoned in the Department of Correction not less than two (2) years nor more than five (5) years” in (a)(2); in (b), inserted “or she” and substituted “Class D felony” for “felony and shall be imprisoned in the De-

partment of Correction not less than two (2) years nor more than five (5) years pursuant to subsection (a) of this section, and shall be suspended from office permanently by the circuit judge”; and, in (c), inserted “or she” and substituted “Class D felony” for “felony and imprisoned in the Department of Correction not less than two (2) years nor more than five (5) years pursuant to subsection (a) of this section, and the Supreme Court shall revoke his license to practice law.”

5-53-134. Violation of an order of protection.

(a)(1) A person commits the offense of violation of an order of protection if:

(A) A circuit court or other court with competent jurisdiction has issued a temporary order of protection or an order of protection against the person pursuant to the The Domestic Abuse Act of 1991, § 9-15-101 et seq.;

(B) The person has received actual notice or notice pursuant to the Arkansas Rules of Civil Procedure of a temporary order of protection or an order of protection pursuant to the The Domestic Abuse Act of 1991, § 9-15-101 et seq.; and

(C) The person knowingly violates a condition of an order of protection issued pursuant to the The Domestic Abuse Act of 1991, § 9-15-101 et seq.

(2) A person commits the offense of violation of an out-of-state order of protection if:

(A) The court of another state, a federally recognized Indian tribe, or a territory with jurisdiction over the parties and matters has issued a temporary order of protection or an order of protection against the person pursuant to the laws or rules of the other state, federally recognized Indian tribe, or territory;

(B) The person has received actual notice or other lawful notice of a temporary order of protection or an order of protection pursuant to the laws or rules of the other state, the federally recognized Indian tribe, or the territory;

(C) The person knowingly violates a condition of an order of protection issued pursuant to the laws or rules of the other state, the federally recognized Indian tribe, or the territory; and

(D) The requirements of § 9-15-302 concerning the full faith and credit for an out-of-state order of protection have been met.

(b) Violation of an order of protection under this section is a Class A misdemeanor.

(c)(1) A law enforcement officer may arrest and take into custody without a warrant any person who the law enforcement officer has probable cause to believe:

(A) Is subject to an order of protection issued pursuant to the laws of this state; and

(B) Has violated the terms of the order of protection, even if the violation did not take place in the presence of the law enforcement officer.

(2) Under § 9-15-302, a law enforcement officer or law enforcement agency may arrest and take into custody without a warrant any person who the law enforcement officer or law enforcement agency has probable cause to believe:

(A) Is subject to an order of protection issued pursuant to the laws or rules of another state, a federally recognized Indian tribe, or a territory; and

(B) Has violated the terms of the out-of-state order of protection, even if the violation did not take place in the presence of the law enforcement officer.

(d) It is an affirmative defense to a prosecution under this section that the parties have reconciled prior to the violation of the order of protection.

(e) Any law enforcement officer acting in good faith and exercising due care in making an arrest for domestic abuse in an effort to comply with this subchapter shall have immunity from civil or criminal liability.

History. Acts 1991, No. 267, § 1; 1991, No. 1236, § 1; 2003, No. 651, § 4.

A.C.R.C. Notes. References to “this subchapter” in §§ 5-53-101 — 5-53-133 may not apply to this section which was enacted subsequently.

Amendments. The 2003 amendment redesignated former (a), (a)(1), (a)(2) and (a)(3) as present (a)(1), (a)(1)(A), (a)(1)(B) and (a)(1)(C) respectively; substituted “circuit” for “chancery” in present (a)(1)(A); added present (a)(2); inserted “under this section” in (b); inserted the

present subdivision (c)(1), (c)(1)(A) and (c)(1)(B) designations; deleted “who the officer has probable cause to believe” from the beginning of present (c)(1)(B); added present (c)(2); and, in (e), inserted “in an effort to comply with this subchapter” and “or criminal.”

Cross References. Filing cost for domestic violence charges or petitions, § 5-26-310, 9-15-202.

Full faith and credit for out-of-state protection orders, § 9-15-302.

CASE NOTES

Cited: West v. State, 82 Ark. App. 165, 120 S.W.3d 100 (2003).

SUBCHAPTER 2 — THREATENING A JUDICIAL OFFICIAL OR JUROR

SECTION.

5-53-201. Definitions.

5-53-202. Threatening a judicial official
or juror — Penalty.**5-53-201. Definitions.**

As used in this subchapter:

(1) “Immediate family” means the spouse or child of a judicial official or juror;

(2) “Judicial official” means any:

(A) District judge, circuit judge, or Court of Appeals judge;

(B) Supreme Court Justice; or

(C) Person authorized to hear evidence under oath; and

(3) “Juror” means any citizen of the state impaneled as a grand juror or petit juror.

History. Acts 2003, No. 1313, § 1.**RESEARCH REFERENCES****UALR L.J.** Survey of Legislation, 2003 Law, Threatening Judicial Officer or Juror, 26 UALR L.J. 364.
Arkansas General Assembly, Criminal**5-53-202. Threatening a judicial official or juror — Penalty.**

(a) A person commits the offense of threatening a judicial official or juror if the person directly or indirectly utters or otherwise makes a threat toward another person whom the person knows or should know to be a:

(1) Judicial official;

(2) Juror; or

(3) Member of the immediate family of a judicial official or juror.

(b)(1) Threatening a judicial official or juror is a Class B felony if the person threatens:

(A) To cause death or serious physical injury to a judicial official, juror, or any member of a judicial official’s or juror’s immediate family; or

(B) Substantial damage to property owned or possessed by a judicial official, juror, or any member of a judicial official’s or juror’s immediate family.

(2) Threatening a judicial official or juror is a Class C felony if the person threatens:

(A) To cause physical injury to a judicial official, juror, or any member of a judicial official’s or juror’s immediate family; or

(B) Damage to property owned or possessed by a judicial official, juror, or any member of a judicial official’s or juror’s immediate family.

(c) It is an affirmative defense to any prosecution under this subchapter that at the time the defendant engaged in the conduct, the threat did not relate to the person's status or actions as a:

- (1) Judicial official;
- (2) Juror; or
- (3) Member of the immediate family of a judicial official or juror.

History. Acts 2003, No. 1313, § 2.

CHAPTER 54

OBSTRUCTING GOVERNMENTAL OPERATIONS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. TERRORISM.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Because of the enactment of Subchapter 2 of this chapter by Acts 2003, No. 1342, the provisions of this chapter existing before that act have been designated as Subchapter 1.

Cross References. Escape or rescue after arrest, right to recapture, reward, § 16-81-112.

Fines, § 5-4-201.

Notice of escapes to law enforcement officers, § 12-29-113.

Notice of escape to victim or victim's next of kin, § 12-29-114.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1953, No. 88, § 5: Feb. 18, 1953. Emergency clause provided: "Whereas, it has been found by the Legislature that visitors or other persons entering places where prisoners are confined are carrying firearms, explosives, intoxicating beverages, narcotics, barbiturates, marijuana, benzedrene, or other stimulants, to inmates and that such action threatened the peace, safety and discipline of said penitentiary, farm, jail or institution, and that this Act will provide for greater peace, safety and discipline in said penitentiary, farm, jail, or institution. Therefore, an emergency is declared to exist and this Act being necessary for the public peace, health and safety shall take effect and be in full force from the date of its approval."

Acts 1975, No. 973, § 6: Apr. 9, 1975.

Emergency clause provided: "It is hereby found and determined by the General Assembly that the private ownership and use of equipment designed for and used to receive and decode messages or communications sent through voice privacy adaptors by law enforcement agencies is capable of seriously hampering the effective administration of law; that such equipment is relatively inexpensive and is available to anyone desiring to purchase the same; that such equipment can be used by law violators to avoid apprehension by law enforcement officers; that it is essential to the proper and effective enforcement of the laws of this State and to the safety and well-being of the law abiding citizens of the State that private ownership of such equipment be prohibited; that this Act is designed to prohibit such private ownership and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 686, § 3: Mar. 27, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the penalties prescribed in the present law are inadequate to deter introduction of prohibited articles in certain facilities; that this act is designed to correct this deficiency and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this

Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 1049, § 3: Apr. 17, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that stiffer penalties are needed to thwart persons who assist inmates of correctional facilities in escape attempts. Therefore, this Act is immediately necessary to aid law enforcement personnel and prosecutors. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full

force and effect from and after its passage and approval."

Acts 1988 (4th Ex. Sess.), No. 8, § 4 and No. 23, § 4: July 15, 1988. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present provisions do not allow persons incarcerated in the Department of Correction to properly exercise their religious beliefs. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted. 3 ALR 4th 1085.

Am. Jur. 5 Am. Jur. 2d, Arrest, § 113.
27A Am. Jur. 2d, Escape, § 1 et seq.
58 Am. Jur. 2d, Obst. Jus., § 1 et seq.

Ark. L. Rev. 1976 Criminal Code — General Principles, 30 Ark. L. Rev. 111.

C.J.S. 30A C.J.S., Escape, § 1 et seq.
67 C.J.S., Obst. Jus., § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 1 UALR L.J. 153.

Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-54-101. Definitions.
- 5-54-102. Obstructing governmental operations.
- 5-54-103. Resisting arrest — Refusal to submit to arrest.
- 5-54-104. Interference with a law enforcement officer.
- 5-54-105. Hindering apprehension or prosecution.
- 5-54-106. Aiding consummation of offense.
- 5-54-107. Compounding.
- 5-54-108. Hindering prosecution and compounding — No defense.
- 5-54-109. Refusing to assist law enforcement officer.
- 5-54-110. First degree escape.
- 5-54-111. Second degree escape.
- 5-54-112. Third degree escape.
- 5-54-113. Permitting escape in the first degree.
- 5-54-114. [Repealed.]

SECTION.

- 5-54-115. Permitting escape or unauthorized departure in the second degree.
- 5-54-116. Aiding an unauthorized departure.
- 5-54-117. Furnishing implement for escape.
- 5-54-118. Furnishing implement for unauthorized departure.
- 5-54-119. Furnishing prohibited articles.
- 5-54-120. Failure to appear.
- 5-54-121. Tampering with a public record.
- 5-54-122. Filing false report with law enforcement agency.
- 5-54-123, 5-54-124. [Reserved.]
- 5-54-125. Fleeing.
- 5-54-126. Killing or injuring animals used by law enforcement or search and rescue dogs.
- 5-54-127. [Repealed.]
- 5-54-128. [Repealed.]
- 5-54-129. Search of persons and vehicles entering institutions.

SECTION.

5-54-130. Radio voice privacy adapters.
5-54-131. Absconding.

SECTION.

5-54-132. Projecting a laser light on a law enforcement officer.

5-54-101. Definitions.

As used in this chapter:

(1) "Arkansas State Hospital" includes any subdivision or facility of the Arkansas State Hospital and any other hospital established by law or legally designated for similar purposes;

(2)(A) "Correctional facility" means any place used for the confinement of persons charged with or convicted of an offense or otherwise confined under a court order.

(B) "Correctional facility" does not include youth services programs and applies to the Arkansas State Hospital only as to persons detained there charged with or convicted of an offense;

(3)(A) "Custody" means actual or constructive restraint by a law enforcement officer pursuant to an arrest or a court order.

(B) "Custody" does not include detention in a correctional facility, youth services program, or the Arkansas State Hospital;

(4) "Deadly physical force" means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury;

(5) "Escape" means the unauthorized departure of a person from custody or a correctional facility;

(6) "Governmental function" means any activity that a public servant is legally authorized to undertake on behalf of any governmental unit he or she serves;

(7) "Implement for escape" means any weapon, tool, or other thing that may be useful for escape;

(8) "Implement for unauthorized departure" means any weapon, tool, or other thing that may be useful for unauthorized departure;

(9) "Juvenile detention facility" means any facility for the temporary care of juveniles alleged to be delinquent, or adjudicated delinquent and awaiting disposition, who require secure custody in a physically restricting facility designed and operated with all entrances and exits under the exclusive control of the facility's staff, so that a juvenile may not leave the facility unsupervised or without permission;

(10) "Physical force" means any bodily impact, restraint, or confinement or the threat of bodily impact, restraint, or confinement;

(11) "Prohibited article" means:

(A) An intoxicating beverage other than sacramental wine labeled as sacramental wine and supplied by a religious official who supplies the sacramental wine to an inmate in the Department of Correction or Department of Community Correction for the sole purpose of an approved religious service, pursuant to rules and regulations promulgated by the Board of Corrections;

(B) A controlled substance, as defined by §§ 5-64-101 et seq. — 5-64-601 et seq., not prescribed by a physician for the benefit of the person to whom it is delivered;

(C) A weapon, including a firearm or anything manifestly designed, made, adapted, or capable of being adapted to inflict physical injury, and anything that in the manner of its use or intended use is capable of causing physical injury; or

(D) Anything furnished an inmate in a correctional facility, the Arkansas State Hospital, or juvenile training school without authorization of a person charged with the duty of maintaining the safety or security of the institution or any person confined in the institution;

(12) “Public record” includes all official books, papers, exhibits, or records of any type required by law to be created by or received and retained in any governmental office or agency, affording notice or information to the public or constituting a memorial of an act or transaction of a public office or public servant; and

(13)(A) “Youth services program” means a residential program operated by the Division of Youth Services of the Department of Health and Human Services or its contractor for the purpose of detaining, housing, and treating persons committed to the division.

(B) A person committed to the division and placed in a youth services program is in the custody of the youth services program while attending or participating in any activity conducted or arranged by the youth services program, regardless of the physical location of the activity.

History. Acts 1975, No. 280, § 2801; 1977, No. 360, § 13; A.S.A. 1947, § 41-2801; Acts 1988 (4th Ex. Sess.), No. 8, § 1; 1988 (4th Ex. Sess.), No. 23, § 1; 1997, No. 1229, §§ 1, 2; 1997, No. 1299, §§ 1, 2; 2005, No. 1994, § 253.

Amendments. The 2005 amendment substituted “youth services program” for “juvenile training school” in (1) and (2); inserted “or she” in (4); and rewrote (13).

CASE NOTES

ANALYSIS

Correctional facility.
Escape.
Public record.

Correctional Facility.

A holding cell which was located in a county courthouse and was used as a temporary facility to hold prisoners before and after their appearances in court constituted a correctional facility. *Glover v. State*, 8 Ark. App. 104, 648 S.W.2d 824 (1983).

Escape.

Where the defendant forged a court order which declared his convictions void, there was sufficient evidence to sustain a

guilty verdict for second degree escape, and the Attorney General's statement that the order was valid did not legitimize the fraudulent order. *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986).

Public Record.

A defendant's handwritten documentation fit squarely into the subdivision (11) [former] definition of a public record, as a matter of law. *Williams v. State*, 346 Ark. 304, 57 S.W.3d 706 (2001).

Cited: *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977); *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999); *Kelley v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001); *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

5-54-102. Obstructing governmental operations.

(a) A person commits the offense of obstructing governmental operations if the person:

(1) Knowingly obstructs, impairs, or hinders the performance of any governmental function;

(2) Knowingly refuses to provide information requested by an employee of a governmental agency relating to the investigation of a case brought under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq., and is the physical custodian of the child in the case;

(3) Fails to submit to court-ordered scientific testing by a noninvasive procedure to determine the paternity of a child in a case brought under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq.; or

(4) Falsely identifies himself or herself to a law enforcement officer.

(b)(1) Obstructing governmental operations by using or threatening to use physical force is a Class A misdemeanor.

(2) Otherwise, obstructing governmental operations is a Class C misdemeanor.

(c) This section does not apply to:

(1) Unlawful flight by a person charged with an offense;

(2) Refusal to submit to arrest;

(3) Any means of avoiding compliance with the law not involving affirmative interference with a governmental function unless specifically set forth in this section; or

(4) Obstruction, impairment, or hindrance of what a person reasonably believes is a public servant's unlawful action.

History. Acts 1975, No. 280, § 2802; A.S.A. 1947, § 41-2802; Acts 1995, No. 1182, § 1; 1999, No. 577, § 1; 2005, No. 1994, § 453.

Amendments. The 2005 amendment rewrote (c)(4).

CASE NOTES

ANALYSIS

Evidence held insufficient.

Evidence held sufficient.

Evidence Held Insufficient.

Where arrestee who sued police officer and city under 42 U.S.C.S. § 1983 alleged that he was arrested merely because (1) he watched the police officer as he spoke with two young men from a distance, (2) during the incident arrestee spoke only when spoken to, and (3) arrestee complied with a request for identification, and where police officer admitted some of those facts but asserted that arrestee was arrested only after he refused to move, the court properly denied officer summary judgment based on qualified immunity; under those circumstances, no officer rea-

sonably could have believed he had probable cause to arrest the arrestee for obstruction of justice or any other offense. *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005).

Evidence Held Sufficient.

Evidence that defendant exited his residence and began screaming at officers who were investigating a possible drunk driver who had been stopped in defendant's driveway, causing the suspect to stop cooperating with the police investigation, was sufficient to support defendant's conviction of obstructing governmental operations. *Kelley v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001).

Cited: *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

5-54-103. Resisting arrest — Refusal to submit to arrest.

(a)(1) A person commits the offense of resisting arrest if he or she knowingly resists a person known by him or her to be a law enforcement officer effecting an arrest.

(2) As used in this subsection, “resists” means using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.

(3) It is no defense to a prosecution under this subsection that the law enforcement officer lacked legal authority to make the arrest if the law enforcement officer was acting under color of his or her official authority.

(4) Resisting arrest is a Class A misdemeanor.

(b)(1) A person commits the offense of refusal to submit to arrest if he or she knowingly refuses to submit to arrest by a person known by him or her to be a law enforcement officer effecting an arrest.

(2) As used in this subsection, “refuses” means active or passive refusal.

(3) It is no defense to a prosecution under this subsection that the law enforcement officer lacked legal authority to make the the arrest if the law enforcement officer was acting under color of his or her official authority.

(4) Refusal to submit to arrest is a Class B misdemeanor.

History. Acts 1975, No. 280, § 2803; A.S.A. 1947, § 41-2803; Acts 1987, No. 261, § 1.

CASE NOTES**ANALYSIS**

Constitutionality.

Acts constituting offense.

Defense.

Evidence.

Indictment or information.

Law enforcement officer.

Lesser included offenses.

Remedies.

Resistance.

Resistance or interference.

Validity of process.

Constitutionality.

A reasonable and commonly understood construction of subsection (b) gives a person of ordinary intelligence fair warning that an inactive or passive form of non-compliance with the arrest process can subject one to punishment, and this section is not unconstitutionally vague. *Pursley v. State*, 302 Ark. 471, 791 S.W.2d 359 (1990).

Defendant failed to show that subsection (b) unconstitutionally violated his freedom of speech rights, as it is written or as it was applied to him. *Williams v. State*, 320 Ark. 211, 895 S.W.2d 913 (1995).

Acts Constituting Offense.

Defendant who became involved in a police station brawl should have been charged with resisting arrest or disorderly conduct, not with interfering with a police officer in the performance of his duties. *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978).

Defendant's actions held not to support his conviction for interfering with a police officer in the performance of his duties, although they may have constituted the offense of resisting arrest. *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980).

Defense.

Defendant committed an assault with a deadly weapon when he shot police officer

who was trying to arrest his brother for drunkenness, and it was no excuse that police officer advanced toward defendant, as police officer had a right to disarm the defendant. *Ogles v. State*, 214 Ark. 581, 217 S.W.2d 259 (1949) (decision under prior law).

Evidence.

Evidence held sufficient to support conviction. *Williams v. State*, 70 Ark. 393, 68 S.W. 241 (1902); *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973); *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973) (preceding decisions under prior law).

Evidence held sufficient where it was shown that the defendant continuously struggled with the arresting officers when they attempted to place handcuffs on him and that he repeatedly swung at them and attempted to kick them. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

Indictment or Information.

In drawing an indictment for obstructing or resisting an officer, it was not necessary to allege that the officer seeking to arrest certain parties had a warrant for their arrest. *State v. Embrey*, 135 Ark. 262, 204 S.W. 1139 (1918) (decision under prior law).

Law Enforcement Officer.

Though the patrolman was off duty at the time of arrest, defendant was guilty of resisting arrest. *Meyers v. State*, 253 Ark. 38, 484 S.W.2d 334 (1972) (decision under prior law).

Lesser Included Offenses.

Aggravated and first degree assault are not lesser included offenses of resisting arrest. *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

Remedies.

Consistent with the legislative purpose for this section, defendant's remedy for any violation of his constitutional rights stemming from his arrest was to submit his dispute to the impartial determination of a court of law, including, if appropriate, an action for damages; his remedy was not to refuse to submit to his arrest. *Williams v. State*, 320 Ark. 211, 895 S.W.2d 913 (1995).

Resistance.

The use of any means, whether threats, intimidations, or any other act willfully

done, with intent to deter, hinder or prevent an officer from the performance of his duty constituted a violation of former section concerning obstructing or resisting an officer. *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973) (decision under prior law).

Arrest was not complete at the moment handcuffs were put on defendants, who were in the process of committing the offense of criminal trespass when the officers handcuffed them, and would not move and continued to commit the trespass even after the handcuffs were secured. As a result, the arrest was not complete until the continuing trespass offense was ended, and the defendants, by refusing to move, were passively refusing to submit to arrest. *Pursley v. State*, 302 Ark. 471, 791 S.W.2d 359 (1990).

The use of physical force is not required to sustain a conviction; a threat of physical force is sufficient. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

Resistance or Interference.

The distinction between resisting arrest and interference with a law enforcement officer as defined in § 5-54-104 is that resisting the officer occurs when one knowingly resists a person known by him to be a law enforcement officer attempting to effect an arrest, while the interference referred to in § 5-54-104 is designed to cover the situation where a person is interfering with an officer performing some duty other than arresting the person charged. *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

The offense of interference with a police officer was not intended to be an alternative to charging someone with resisting arrest. *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982).

Validity of Process.

Validity of the criminal process, regular on its face, was immaterial. *Crabtree v. State*, 238 Ark. 358, 381 S.W.2d 729 (1964) (decision under prior law).

Cited: *Delrio v. State*, 263 Ark. 888, 568 S.W.2d 15 (1978); *Duckins v. State*, 271 Ark. 658, 609 S.W.2d 674 (Ct. App. 1980); *Easterly v. State*, 8 Ark. App. 135, 648 S.W.2d 843 (1983); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412

(1992); *Williams v. State*, 327 Ark. 97, 938 S.W.2d 547 (1997).

5-54-104. Interference with a law enforcement officer.

(a) A person commits the offense of interference with a law enforcement officer if he or she knowingly employs or threatens to employ physical force against a law enforcement officer engaged in performing his or her official duties.

(b)(1) Interference with a law enforcement officer is a Class C felony if:

(A) The person uses or threatens to use deadly physical force; or

(B) The person is assisted by one (1) or more other persons and physical injury to the law enforcement officer results.

(2) Otherwise, interference with a law enforcement officer is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2804; 1977, No. 360, § 14; A.S.A. 1947, § 41-2804.

CASE NOTES

ANALYSIS

Applicability.

Acts constituting offense.

Evidence.

Justification.

Performance of official duties.

Resistance or interference.

Search warrant.

Separate offenses.

Applicability.

Former section providing penalty for obstructing or resisting an officer applied to knowing and willful obstruction of or resistance to an officer in the discharge of any official duty. *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973) (decision under prior law).

This section is not applicable when one resists his arrest. *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980).

The offense of interference applies only where a police officer is interfered with in the performance of his duty by someone other than whom the officer is trying to arrest; the offense of interference with a police officer was not intended to be an alternative to charging someone with resisting arrest. *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982).

Acts Constituting Offense.

Defendant was not guilty of violating

former section concerning obstructing or where the sheriff subsequently informed defendant that the arrangement which had been made with a deputy sheriff regarding an attached crop was unsatisfactory; the former statute meant to punish obstruction of or opposition to the officer and not merely meant to defeat the execution of process otherwise. *Warren v. State*, 179 Ark. 725, 17 S.W.2d 866 (1929) (decision under prior law).

Defendant who became involved in a police station brawl, should have been charged with resisting arrest or disorderly conduct not with interfering with a police officer in the performance of his duties. *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978).

Defendant's actions held not to support his conviction for interfering with a police officer in the performance of his duties, although they may have constituted the offense of resisting arrest. *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980).

Where defendant fired several shots at a police officer in order to avoid apprehension, the defendant could not have properly been charged with interference with a law enforcement officer, but should instead have been prosecuted for resisting arrest. *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982).

One may be found guilty of interference where one interferes with an official investigation that precedes an effort to effect an arrest. *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

Evidence.

To convict an accused of assaulting an officer, it was not necessary that there be direct evidence that those assaulting the police officer did so from common design, intent, and purpose, but such could be proven by all the circumstances. *Griffin v. State*, 248 Ark. 1223, 455 S.W.2d 882 (1970) (decision under prior law).

Evidence of assault with an eight ounce drink glass was sufficient since any object likely to cause death or great bodily injury could be a deadly weapon. *Hunt v. State*, 255 Ark. 51, 498 S.W.2d 654 (1973) (decision under prior law).

Evidence held sufficient to support conviction. *Delrio v. State*, 263 Ark. 888, 568 S.W.2d 15 (1978); *Easterly v. State*, 8 Ark. App. 135, 648 S.W.2d 843 (1983); *Cole v. State*, 33 Ark. App. 98, 802 S.W.2d 472 (1991).

Justification.

Refusal to give the defendant's requested instruction on justification for the use of physical force in defense of another person held to be error. *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982).

Performance of Official Duties.

Police officer's statement that the encounter occurred just before he was to interview some complainants would not support a conviction under this section. *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978).

Court did not abuse its discretion in not allowing the defendants to offer proof of certain alleged incidents of prior misconduct on the part of the officer, which the defendants offered in an effort to show that the officer may not have been en-

gaged in official business at the time of the incident in question. *Blakemore v. State*, 268 Ark. 145, 594 S.W.2d 231 (1980).

Where a police officer who was in the performance of his official duties in going to investigate another incident in which the defendant had been a participant became involved in a scuffle with the defendant and defendant pointed a rifle at the officer, the defendant could be convicted under this section. *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

Resistance or Interference.

The distinction between resisting arrest as defined in § 5-54-103 and interference with a law enforcement officer as defined in this section is that resisting the officer occurs when one knowingly resists a person known by him to be a law enforcement officer attempting to effect an arrest, while the interference referred to in this section is designed to cover the situation where a person is interfering with an officer performing some duty other than arresting the person charged. *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

Search Warrant.

Where search warrant was regular on its face, one could not obstruct the service of such process without being subject to prosecution. *Crabtree v. State*, 238 Ark. 358, 381 S.W.2d 729 (1964) (decision under prior law).

Separate Offenses.

Where defendant drew a pistol on a police officer and took the officer's revolver away from him, there were two separate crimes although arising out of the same incident. *Decker v. State*, 251 Ark. 28, 471 S.W.2d 343 (1971) (decision under prior law).

Cited: *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (1980); *Bell v. Lockhart*, 741 F.2d 1105 (8th Cir. 1984); *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

5-54-105. Hindering apprehension or prosecution.

(a) A person commits an offense under this section if, with purpose to hinder the apprehension, prosecution, conviction, or punishment of another person for an offense, he or she:

(1) Harbors or conceals the other person;

(2) Provides or aids in providing the other person with a weapon, money, transportation, disguise, or other means of avoiding apprehension, discovery, or effecting escape;

(3) Prevents or obstructs anyone from performing an act which might aid in the discovery, apprehension, or identification of the other person by means of force or intimidation or the threat of force or intimidation, or by means of deception;

(4) Conceals, alters, destroys, or otherwise suppresses the discovery of any fact, information, or other thing related to the crime which might aid in the discovery, apprehension, or identification of the other person;

(5) Warns the other person of impending discovery, apprehension, or identification;

(6) Volunteers false information to a law enforcement officer; or

(7) Purposely lies or attempts to purposely provide erroneous information, documents, or other instrumentalities which he or she knows to be false to a certified law enforcement officer that would distract from the true course of the investigation or inhibit the logical or orderly progress of the investigation.

(b)(1)(A) Hindering apprehension or prosecution is a Class B felony if the conduct of the person assisted in violation of this section constitutes a Class Y felony or a Class A felony.

(B) However, except as provided in subdivision (b)(2) of this section, if the defendant shows by a preponderance of the evidence that he or she stands to the person assisted in the relation of parent, child, brother, sister, husband, or wife, hindering apprehension or prosecution is a Class D felony.

(2) Subdivision (b)(1)(B) of this section does not apply if the offense of the person assisted is:

(A) Capital murder, as prohibited in § 5-10-101;

(B) Murder in the first degree, as prohibited in § 5-10-102;

(C) Kidnapping, as prohibited in § 5-11-102; or

(D) Rape, as prohibited in § 5-14-103.

(c) Hindering apprehension or prosecution is a felony classified one (1) degree below the felony constituted by the conduct of the person assisted in violation of this section if the conduct is a Class B felony or a Class C felony.

(d)(1) Hindering apprehension or prosecution is a Class A misdemeanor if the conduct of the person assisted in violation of this section is a Class D felony or an unclassified felony.

(2) Hindering apprehension or prosecution is a Class D felony if the person in violation of this section was assisting an escapee from correctional custody sentenced after being found guilty of a felony.

(3) Otherwise, hindering apprehension or prosecution is a misdemeanor classed one (1) degree below the misdemeanor constituted by the conduct of the person assisted in violation of this section.

History. Acts 1975, No. 280, § 2805; 1977, No. 360, § 15; 1985, No. 698, § 1; 1985, No. 1049, § 1; A.S.A. 1947, § 41-2805; Acts 1997, No. 743, § 1; Acts 2005, No. 1867, § 1.

Amendments. The 2005 amendment inserted the subdivision (1)(A) and (1)(B) designations in (b); added (b)(2); in

present (b)(1)(B), substituted "However, except as provided in subdivision (b)(2) of this section" for "provided that" and deleted "corresponding steprelationships of the preceding" following "brother, sister"; and made gender neutral and minor stylistic changes.

RESEARCH REFERENCES

Ark. L. Rev. The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Accessory after the fact.

Accomplice.

Affirmative act.

Evidence.

Harboring or concealment.

Knowledge and intent.

Reasonable cause to arrest.

Constitutionality.

The mere existence of overlapping provisions in this section and § 5-53-111 does not render either statute constitutionally infirm; there appears to be no impermissible uncertainty in the definitions of the respective offenses. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

Applicability.

The plain language of subdivision (a)(4) precludes a construction that limits its applicability to a person's acts of hindering that transpire before a criminal suspect has been identified and arrested. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

Accessory After the Fact.

An instruction that an accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate or harbors or protects the person charged with the crime; in other words, a person who harbors, receives, relieves, comforts or assists the felon was not erroneous. *Higgins v. State*, 136 Ark. 284, 206 S.W. 440 (1918) (decision under prior law).

One who was formerly an accessory after the fact is now guilty of a separate

crime, i.e., hindering apprehension and prosecution. *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 328 (1979).

Accomplice.

An accessory before the fact is now referred to as an accomplice, defined in § 5-2-403, and one who was formerly an accessory after the fact is now guilty of a separate crime under this section. *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

Affirmative Act.

To constitute the crime of accessory after the fact there must have been some affirmative act, as mere passive failure to disclose commission of a crime did not make one an accessory after the fact. *Fields v. State*, 213 Ark. 899, 214 S.W.2d 230 (1948) (decision under prior law).

Evidence held to show that there was an affirmative attempt upon the part of the defendant to prevent disclosure of details of a crime and justified conviction of defendant as accessory after the fact. *Fields v. State*, 213 Ark. 899, 214 S.W.2d 230 (1948) (decision under prior law).

Evidence.

Evidence held insufficient to support conviction. *Flippo v. State*, 258 Ark. 233, 523 S.W.2d 390 (1975) (decision under prior law).

Under subsection (a), providing for six different ways in which the offense can be committed with only one involving dishonesty or false statement, evidence of a misdemeanor conviction for that offense was not admissible for impeachment purposes until it was shown that the conviction was

based upon an act of dishonesty or false statement. *West v. State*, 27 Ark. App. 49, 766 S.W.2d 22 (1989).

Evidence was more than sufficient from which a jury could infer that the defendant destroyed fingerprints on the weapon, hid the gun from authorities, and did not tell the authorities of the gun's whereabouts until confronted by the investigating officers. *Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997).

Harboring or Concealment.

One who, with full knowledge that a crime had been committed, harbored and protected the felon, was guilty as accessory after the fact. *State v. Jones*, 91 Ark. 5, 120 S.W. 154 (1909); *Froman v. State*, 232 Ark. 697, 339 S.W.2d 601 (1960) (preceding decisions under prior law).

Knowledge and Intent.

One who, knowing of a crime, concealed it from the magistrate from anxiety for his own safety and not to shield the criminal, was not an accomplice. *Melton v. State*, 43 Ark. 367 (1884); *Carroll v. State*, 45 Ark. 539 (1885). See also *Edmonson v. State*, 51 Ark. 115, 10 S.W. 21 (1888); *Green v. State*, 51 Ark. 189, 10 S.W. 266 (1889); *McFalls v. State*, 66 Ark. 16, 48 S.W. 492 (1898) (preceding decisions under prior law).

The mere fact that one remained silent after learning of the commission, without intending to shield the criminal, did not make him an accessory. *Butt v. State*, 81

Ark. 173, 98 S.W. 723 (1906); *Davis v. State*, 96 Ark. 7, 130 S.W. 547 (1910); *Simms v. State*, 105 Ark. 16, 150 S.W. 113 (1912); *Burrow v. State*, 109 Ark. 365, 159 S.W. 1123 (1913) (preceding decisions under prior law).

Although former law required that the hinderer have full knowledge of the crime committed, this section speaks in terms of the actor's purpose rather than the certainty of his knowledge respecting the consummated crime, and requires only that the hinderer purposely aid one sought for an offense. *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979).

Evidence held sufficient to support finding that defendant had reason to believe that the accused had committed an offense and that she purposely hindered his prosecution. *Workman v. State*, 267 Ark. 103, 589 S.W.2d 20 (1979).

Reasonable Cause to Arrest.

The district court was not clearly erroneous in concluding that the parolee's attempt to conceal herself in the defendant's room, with his knowledge, coupled with the defendant's assertion of ignorance regarding the parolee's whereabouts, constituted reasonable belief by the officers that the defendant was attempting to hinder the apprehension of the parolee in violation of this section; therefore, the officers had reasonable cause to arrest the defendant. *Washington v. Simpson*, 806 F.2d 192 (8th Cir. 1986).

Cited: *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983).

5-54-106. Aiding consummation of offense.

(a) A person commits an offense under this section if he or she knowingly aids another person by:

- (1) Safeguarding or securing the proceeds of an offense; or
- (2) Converting the proceeds of an offense into negotiable funds.

(b)(1) A person violating any provision of this section is guilty of a Class D felony if the conduct of the person aided in violation of this section constitutes a felony of any class.

(2) Otherwise, a violation of this section is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2806; A.S.A. 1947, § 41-2806.

CASE NOTES

Accomplices.

One who knowingly receives stolen

property for the purpose of safeguarding or securing the proceeds of the offense or

converting the proceeds into negotiable funds might now be guilty of aiding the consummation of an offense under this section, but is not an accomplice in the

sense of § 5-2-403 in that he or she aids the thief in planning or committing the crime. *Tyler v. State*, 265 Ark. 822, 581 S.W.2d 328 (1979).

5-54-107. Compounding.

(a) A person commits the offense of compounding if he or she:

(1) Solicits, accepts, or agrees to accept any pecuniary benefit as consideration for refraining from reporting to a law enforcement authority the commission or suspected commission of any offense or information relating to an offense; or

(2) Offers, confers, or agrees to confer a benefit and the receipt of the benefit is prohibited by this section.

(b) Compounding is a:

(1) Class B felony if the offense concealed is a Class Y felony;

(2) Class C felony if the offense concealed is a Class A felony;

(3) Class D felony if the offense concealed is:

(A) A Class B felony;

(B) A Class C felony;

(C) A Class D felony; or

(D) An unclassified felony; or

(4) Class B misdemeanor if the offense concealed is a misdemeanor of any class.

History. Acts 1975, No. 280, § 2807; 1977, No. 360, § 16; A.S.A. 1947, § 41-2807; Acts 1991, No. 1049, § 1.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 14 UALR L.J. 753.

CASE NOTES

ANALYSIS

Contracts.
Pecuniary benefit.

Contracts.

Any contract, the consideration of which was to conceal crime, or stifle a prosecution therefor, was void. *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S.W. 198, Ann. Cas. 1914A, 511 (1912) (decision under prior law).

A deed of trust executed to secure the payment of embezzled money was not void, in the absence of a promise to forbear prosecution of the husband or to suppress

evidence tending to prove his guilt. *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S.W. 198, Ann. Cas. 1914A, 511 (1912) (decision under prior law).

Pecuniary Benefit.

Where five people, in return for a promised reward, abetted another by agreeing to conceal the truth of a crime, they were all guilty as principals. *Bridges v. State*, 257 Ark. 527, 519 S.W.2d 756 (1975) (decision under prior law).

Cited: *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

5-54-108. Hindering prosecution and compounding — No defense.

It is no defense to a prosecution for hindering prosecution or compounding that the principal offender is not apprehended, prosecuted, convicted, or punished.

History. Acts 1975, No. 280, § 2808;
A.S.A. 1947, § 41-2808.

RESEARCH REFERENCES

Ark. L. Rev. The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

5-54-109. Refusing to assist law enforcement officer.

(a) A person commits the offense of refusing to assist a law enforcement officer if, upon command by a person known by him or her to be a law enforcement officer, the person unreasonably refuses or fails to assist in effecting a lawful arrest or preventing another person from committing an offense.

(b) Refusing to assist a law enforcement officer is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2809;
A.S.A. 1947, § 41-2809.

5-54-110. First degree escape.

(a) A person commits the offense of first degree escape if:

(1) At any time, including from the point of departure from confinement to the return to confinement, aided by another person actually present, he or she uses or threatens to use physical force in escaping from:

- (A) Custody;
- (B) A correctional facility;
- (C) A juvenile detention facility; or
- (D) A youth services program; or

(2) At any time, including from the point of departure from confinement to the return to confinement, he or she uses or threatens to use a deadly weapon in escaping from:

- (A) Custody;
- (B) A correctional facility;
- (C) A juvenile detention facility; or
- (D) A youth services program.

(b) First degree escape is a Class C felony.

History. Acts 1975, No. 280, § 2810; 1229, § 3; 1997, No. 1299, § 3; 2003, No. A.S.A. 1947, § 41-2810; Acts 1997, No. 1348, § 1; 2005, No. 1994, § 254.

Amendments. The 2003 amendment added “At anytime from the point of departure from confinement to the return to confinement” in (a)(1) and (2); and made minor stylistic changes.

The 2005 amendment inserted “including” in (a)(1) and (a)(2); and substituted “program” for “facility” in (a)(1)(D) and (a)(2)(D).

RESEARCH REFERENCES

Ark. L. Rev. Manslaughter: The Resting Place of Several Former Statutes, 30 Ark. L. Rev. 213.

CASE NOTES

ANALYSIS

Accomplice.

Custody.

Furnishing implements for escape.

Indictment or information.

Jury question.

Separate offenses.

Accomplice.

A prisoner who aided others to escape, and escaped himself by the same means, was an accomplice to such escape. *Hillian v. State*, 50 Ark. 523, 8 S.W. 834 (1888) (decision under prior law).

Evidence held sufficient to support conviction as an accomplice. *Shinsky v. State*, 250 Ark. 620, 466 S.W.2d 911 (1971) (decision under prior law); *Ruiz v. State*, 5 Ark. App. 151, 633 S.W.2d 399 (1982).

To convict one as an accomplice to first degree escape, the state is required to prove he aided, agreed to aid or attempted to aid another person to escape as that crime is defined in this section. *Ruiz v. State*, 5 Ark. App. 151, 633 S.W.2d 399 (1982).

Custody.

A person confined in jail was “in custody” within former section which penalized anyone who rescued a felon. *Hillian v. State*, 50 Ark. 523, 8 S.W. 834 (1888) (decision under prior law).

The mere fact of physical custody or imprisonment was not sufficient evidence to sustain a conviction for escape or attempt to escape, but the burden was upon the state to prove that such custody or imprisonment was lawful. *Harding v. State*, 248 Ark. 1240, 455 S.W.2d 695 (1970) (decision under prior law).

Evidence held sufficient to establish that defendant was lawfully imprisoned.

Brown v. State, 252 Ark. 846, 481 S.W.2d 366 (1972) (decision under prior law).

State held to have failed to show that the defendant was in lawful custody at the time he ran away from the presence of the officers, so as to constitute offense of escape under former section concerning escape from penitentiary. *Akins v. State*, 253 Ark. 273, 485 S.W.2d 535 (1972) (decision under prior law).

Furnishing Implements for Escape.

A person guilty of furnishing implements for the escape of county prisoners was liable to be punished under former section concerning penalty for those conveying disguised instruments into jail and not under former section concerning penalty for anyone setting at liberty a prisoner who has been lawfully arrested. *Autrey v. State*, 155 Ark. 546, 244 S.W. 711 (1922) (decision under prior law).

Indictment or Information.

Indictment held sufficient. *Dickens v. State*, 109 Ark. 425, 160 S.W. 218 (1913) (decision under prior law).

Jury Question.

Whether the defendant jumped in front of the arresting officer to prevent him from shooting his brother, or whether he did so to rescue his brother, was for the jury to decide. *Bowlin v. State*, 175 Ark. 1047, 1 S.W.2d 546 (1928) (decision under prior law).

Separate Offenses.

Since kidnapping, theft, and escape involve proof of different elements and are punishable as separate crimes, the defendant was not subjected to double jeopardy due to the multiple sentences imposed by the trial court. *Matthews v. Lockhart*, 726 F.2d 394 (8th Cir. 1984).

Defendant did not commit first-degree escape when he hid in a hog-slop tank in a prison that was hauled from the prison, jumped from the tank once it was outside the prison, walked five miles to the victim's home, and killed and robbed the victim more than three hours after he had escaped from prison; defendant had al-

ready completed his escape from prison, by leaving the bounds within which he was required to remain, when he killed and robbed the victim. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

Cited: *Wright v. State*, 270 Ark. 78, 603 S.W.2d 408 (1980); *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

5-54-111. Second degree escape.

(a) A person commits the offense of second degree escape if he or she:

(1) At any time, including from the point of departure from confinement to the return to confinement, uses or threatens to use physical force in escaping from custody;

(2) Having been found guilty of a felony, escapes from custody;

(3) Escapes from a correctional facility;

(4) Escapes from a juvenile detention facility; or

(5) Escapes from a youth services program.

(b) Second degree escape is a Class D felony.

History. Acts 1975, No. 280, § 2811; A.S.A. 1947, § 41-2811; Acts 1997, No. 1229, § 4; 1997, No. 1299, § 4; 2003, No. 1348, § 2; 2005, No. 1994, § 255.

Amendments. The 2003 amendment added "At anytime from the point of de-

parture from confinement to the return to confinement" in (a)(1); and made stylistic changes.

The 2005 amendment inserted "including" in (a)(1); and substituted "program" for "facility" in (a)(5).

CASE NOTES

ANALYSIS

Correctional facility.

Evidence.

Lesser included offense.

Proof.

Correctional Facility.

Defendant escaping from the holding cell was properly charged with second-degree escape. *Glover v. State*, 8 Ark. App. 104, 648 S.W.2d 824 (1983).

County jail was a "correctional facility." *Stout v. State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Evidence.

Evidence held sufficient to support the defendant's conviction for escape. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982).

Where the defendant forged a court order which declared his convictions void, there was sufficient evidence to sustain a guilty verdict for second degree escape, and the Attorney General's statement that the order was valid did not legitimize

the fraudulent order. *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986).

Lesser Included Offense.

Offense of third-degree escape of which defendant was found guilty is a lesser included offense of second-degree escape with which he was charged. *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977).

Proof.

To convict a person of the crime of escape, it was not sufficient merely to offer evidence that someone by the same name of the accused was convicted, but there had to be evidence that the accused was the same identical person who was convicted. *Pennington v. State*, 260 Ark. 844, 545 S.W.2d 72 (1977) (decision under prior law).

It was not necessary that the state prove a transfer of an inmate from one institution to another so long as it was within the authority of the Department of Correction to make such transfer and the state needed to prove only that the ac-

cused was in the custody of the department when he escaped. *Pennington v. State*, 260 Ark. 844, 545 S.W.2d 72 (1977) (decision under prior law).

There is nothing in this section suggesting that proof of the specific crime is an element of escape, only that the accused has escaped from a correctional facility.

5-54-112. Third degree escape.

(a) A person commits the offense of third degree escape if he or she escapes from custody.

(b) It is a defense to a prosecution under this section that the person escaping was in custody pursuant to an unlawful arrest.

(c) Third degree escape is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2812; A.S.A. 1947, § 41-2812.

Bussard v. State, 296 Ark. 556, 759 S.W.2d 24 (1988).

Cited: *Glick v. State*, 3 Ark. App. 175, 623 S.W.2d 546 (1981); *Bosnick v. State*, 275 Ark. 52, 627 S.W.2d 23 (1982); *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

CASE NOTES

ANALYSIS

- Defenses.
- Evidence.
- Instructions.
- Intent.

Defenses.

Since a conviction of third-degree escape can be based on any of three culpable mental states, this crime is a general intent crime for which voluntary intoxication is no defense. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985).

Evidence.

Evidence held sufficient for the jury to decide that defendant was guilty of third degree escape. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

Instructions.

Where the defendant escaped from the holding cell, refusal to instruct on the lesser included offense of third-degree escape from mere custody was proper. *Glover v. State*, 8 Ark. App. 104, 648 S.W.2d 824 (1983).

Intent.

Specific intent is not a necessary element of this crime; the mens rea may be satisfied by proof that the accused acted recklessly or knowingly, as well as by proof that the accused acted purposely. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985).

Cited: *France v. State*, 262 Ark. 193, 555 S.W.2d 225 (1977); *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

5-54-113. Permitting escape in the first degree.

(a) A public servant responsible for supervision of persons detained in correctional facilities or in custody commits the offense of permitting escape in the first degree if he or she knowingly permits the escape of a person known to be detained in a correctional facility or in custody pursuant to an arrest for, or a charge or conviction of, a felony of any class.

(b) Permitting escape in the first degree is a Class C felony.

History. Acts 1975, No. 280, § 2813; A.S.A. 1947, § 41-2813.

CASE NOTES

ANALYSIS

In general.
Construction.
Drunkenness.
Evidence.
Indictment or information.
Intent.

In General.

A voluntary escape took place when one who had a felon lawfully in his custody voluntarily permitted him to escape from it or to go at large. *Martin v. State*, 32 Ark. 124 (1877) (decision under prior law).

Construction.

Former section establishing penalty for those permitting the escape of any convict should have been strictly constructed. *Decker v. State*, 189 Ark. 739, 75 S.W.2d 69 (1934) (decision under prior law).

Drunkenness.

Where the escape of a prisoner was not caused or contributed to by the defendant's drunkenness, it was held that the fact that the defendant was drunk did not render him guilty of permitting the escape of a convict. *Decker v. State*, 189 Ark. 739,

75 S.W.2d 69 (1934) (decision under prior law).

Evidence.

The fact that a prisoner was hiding outside the prison grounds was sufficient evidence for a jury to infer that he intended to escape. *Cassady v. State*, 247 Ark. 690, 447 S.W.2d 144 (1969) (decision under prior law).

Indictment or Information.

Indictment held to sufficiently allege that the prisoner was in the defendant's lawful custody. *Haupt v. State*, 100 Ark. 409, 140 S.W. 294 (1911) (decision under prior law).

Intent.

The offense of voluntary escape consisted of voluntarily suffering, permitting or conniving at the escape of a prisoner from custody or permitted him to go at large, and it was unnecessary to prove that this was done with the intent to save him from trial or the execution of a sentence. *Haupt v. State*, 100 Ark. 409, 140 S.W. 294 (1911) (decision under prior law).

Cited: *State v. Garrison*, 272 Ark. 470, 615 S.W.2d 371 (1981).

5-54-114. [Repealed.]

Publisher's Notes. This section, concerning permitting escape in the second degree, was repealed by Acts 2005, No.

1994, § 532. The section was derived from Acts 1975, No. 280, § 2814; A.S.A. 1947, § 41-2814.

5-54-115. Permitting escape or unauthorized departure in the second degree.

(a) A public servant is responsible for the supervision of persons from:

- (1) A correctional facility;
- (2) Custody; or
- (3) Pursuant to a court order or petition in:
 - (A) The Arkansas State Hospital; or
 - (B) A juvenile detention facility or youth services program.

(b) A public servant, as listed in subdivision (a)(3) of this section, commits the offense of permitting escape or unauthorized departure in the second degree if he or she recklessly permits a person to escape or make an unauthorized departure.

(c) Permitting escape or unauthorized departure in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2815; A.S.A. 1947, § 41-2815; Acts 1997, No. 1229, § 5; 1997, No. 1299, § 5; 2005, No. 1994, § 329.

Amendments. The 2005 amendment rewrote this section.

5-54-116. Aiding an unauthorized departure.

- (a) A person commits the offense of aiding an unauthorized departure if, not being an inmate in a youth services program, a youth services facility, or the Arkansas State Hospital, he or she knowingly aids another person in making or attempting to make an unauthorized departure from a juvenile detention facility, a youth services program, or the Arkansas State Hospital.
- (b)(1) Aiding an unauthorized departure is a Class C felony if the person aiding an unauthorized departure uses physical force or uses or threatens to use a deadly weapon.
- (2) Otherwise, aiding an unauthorized departure is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2816; A.S.A. 1947, § 41-2816; Acts 1997, No. 1229, § 6; 1997, No. 1299, § 6; 2005, No. 1994, § 256.

Amendments. The 2005 amendment, in (a), substituted “program” for “facility” twice and inserted “or she.”

5-54-117. Furnishing implement for escape.

- (a) A person commits the offense of furnishing an implement for escape if, with the purpose of facilitating escape, he or she:
- (1) Introduces an implement for escape into a correctional facility;
- (2) Provides an inmate in a correctional facility with an implement for escape; or
- (3) Provides a person in custody with an implement for escape.
- (b)(1) Furnishing an implement for escape is a Class C felony if the implement for escape provided is a deadly weapon.
- (2) Otherwise, furnishing an implement for escape is a Class D felony.

History. Acts 1975, No. 280, § 2817; A.S.A. 1947, § 41-2817.

CASE NOTES

Acts Constituting Offense.

Offense was complete when the instrument was conveyed into the jail with the intent mentioned, whether the escape was affected or attempted or not. *Maxey v. State*, 76 Ark. 276, 88 S.W. 1009 (1905) (decision under prior law).

A person guilty of furnishing implements for the escape of county prisoners

was liable to be punished under former section concerning penalty for those conveying disguised instruments into jail and not under former section concerning penalty for anyone setting at liberty a prisoner who has been lawfully arrested. *Autrey v. State*, 155 Ark. 546, 244 S.W. 711 (1922) (decision under prior law).

5-54-118. Furnishing implement for unauthorized departure.

(a) A person commits the offense of furnishing an implement for unauthorized departure if, with the purpose of facilitating an unauthorized departure, he or she:

(1) Introduces an implement for unauthorized departure into the Arkansas State Hospital or a youth services program; or

(2) Provides a person detained in the Arkansas State Hospital or a youth services program with an implement for unauthorized departure.

(b)(1) Furnishing an implement for unauthorized departure is a Class C felony if the implement furnished is a deadly weapon.

(2) Otherwise, furnishing an implement for unauthorized departure is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2818; A.S.A. 1947, § 41-2818; Acts 2005, No. 1994, § 257.

inserted “or she” in (a); and substituted “youth services program” for “juvenile training school” in (a)(1) and (a)(2).

Amendments. The 2005 amendment

5-54-119. Furnishing prohibited articles.

(a) A person commits the offense of furnishing a prohibited article if he or she knowingly:

(1) Introduces a prohibited article into a correctional facility, the Arkansas State Hospital, or a youth services program; or

(2) Provides a person confined in a correctional facility, the Arkansas State Hospital, or a youth services program with a prohibited article.

(b)(1)(A) Furnishing or providing a weapon, intoxicating beverage, controlled substance, moneys, a cellular telephone or other communication device, the components of a cellular telephone or other communication device, or any other items that would facilitate an escape, engaging in a continuing criminal enterprise, § 5-64-405, or violence within a facility is a Class B felony.

(B) Otherwise, furnishing a prohibited article is a Class C felony.

(2) This section does not apply to a religious official who supplies sacramental wine labeled as sacramental wine to an inmate in the Department of Correction for the sole purpose of an approved religious service, pursuant to rules and regulations promulgated by the Board of Corrections.

History. Acts 1975, No. 280, § 2819; 1977, No. 360, § 17; 1985, No. 686, § 1; A.S.A. 1947, § 41-2819; Acts 1988 (4th Ex. Sess.), No. 8, § 2; 1988 (4th Ex. Sess.), No. 23, § 2; 2005, No. 168, § 1; 2005, No. 1994, § 258.

Publisher’s Notes. Acts 1975, No. 280, § 2819, as amended, is also codified as § 12-29-109.

Amendments. The 2005 amendment by No. 168 inserted “or she” in (a); added the subdivision designations in (b); and, in

(b)(1), inserted “a cellular telephone or other communication device, the components of a cellular telephone or other communication device” and “a continuing criminal enterprise as defined in § 5-64-405.”

The 2005 amendment by No. 1994 substituted “youth services program” for “juvenile training school” in (a)(1) and (a)(2); and substituted “Board of Corrections” for “Board of Correction and Community Punishment” in (b)(2).

CASE NOTES

ANALYSIS

Evidence.

Lesser included offenses.

Evidence.

Evidence was sufficient to sustain conviction. *Sims v. State*, 30 Ark. App. 168, 786 S.W.2d 839 (1990).

Lesser Included Offenses.

Possession of marijuana is a lesser-in-

cluded offense of furnishing a prohibited item. *Goodwin v. State*, 342 Ark. 161, 27 S.W.3d 397 (2000), but see *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), restating the test for determining when an offense is included in another offense.

Cited: *K.W. v. State*, 327 Ark. 205, 937 S.W.2d 658 (1997).

5-54-120. Failure to appear.

(a) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:

(1) Cited or summonsed as an accused; or

(2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.

(b) Failure to appear is a Class C felony if the required appearance was to answer a charge of felony or for disposition of any felony charge either before or after a determination of guilt of the felony charge.

(c)(1) Failure to appear is a Class A misdemeanor if the required appearance was to answer a charge of misdemeanor or for disposition of any misdemeanor charge either before or after a determination of guilt of the misdemeanor charge.

(2) Failure to appear is a Class C misdemeanor if the required appearance was to answer a violation.

(d) This section does not apply to an order to appear imposed as a condition of suspension or probation pursuant to § 5-4-303 or an order to appear issued prior to a revocation hearing pursuant to § 5-4-310.

History. Acts 1975, No. 280, § 2820; A.S.A. 1947, § 41-2820; Acts 1991, No. 916, § 1.

CASE NOTES

ANALYSIS

Accomplice.

Excuse.

Requirements.

Accomplice.

Evidence was sufficient to support conviction of bail bondsman as accomplice to failure to appear with respect to the person for whom he was bail bondsman, but not for another person where there was no evidence showing that he was aware of the criminal charges pending against such other person. *Martinez v. State*, 269 Ark. 231, 601 S.W.2d 576 (1980).

Excuse.

Where the defendant had actual notice of the date he was to appear, the failure of the court to give him written notice of the time and place to appear did not violate his due process rights and was not sufficient cause to reverse his conviction for failure to appear. *Harris v. State*, 6 Ark. App. 89, 638 S.W.2d 698 (1982).

Even if defendant proved conclusively that he was advised by his lawyer not to appear, his failure to appear, in violation of this section, would not have been excused. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985).

Defendant did not establish that he had a reasonable excuse for his failure to appear. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Requirements.

Trial court erred in denying defendant's motion to dismiss the charge of failure to appear where the prosecution failed to present sufficient evidence that defendant had actual notice that she was to appear for her arraignment; there was no evidence in the record that the state complied with the notice requirements of this section or Ark. R. Crim. P. 6.3, or that defendant was set at liberty upon condition that she appear at a specified time, place, and court. *Stewart v. State*, — Ark.

App. —, — S.W.3d —, 2004 Ark. App. LEXIS 955 (Dec. 15, 2004).

Circuit court erred in denying defendant's motion to dismiss where the state failed to produce substantial evidence that defendant received actual notice of the time and place to appear in court or that she received written notice of the time and place to appear; more had to be offered in the way of documentary proof or a judge's order, either written or verbal, to subject a defendant to a felony conviction for failure to appear. *Stewart v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 308 (May 19, 2005).

Cited: *Howard v. State*, 289 Ark. 587, 715 S.W.2d 440 (1986).

5-54-121. Tampering with a public record.

(a) A person commits the offense of tampering with a public record if, with the purpose of impairing the verity, legibility, or availability of a public record, he or she knowingly:

- (1) Makes a false entry in or falsely alters any public record; or
- (2) Erases, obliterates, removes, destroys, or conceals a public record.

(b)(1)(A) Tampering with a public record is a Class C felony if the public record is a court record.

(B) Tampering with a public record is a Class B felony if the public record is a court record and the person broke into any building or structure with the intent of tampering with a court record located in the building or structure.

(2) Otherwise, tampering with a public record is a Class D felony.

History. Acts 1975, No. 280, § 2821; A.S.A. 1947, § 41-2821; Acts 1987, No. 37, § 1; 1999, No. 1104, § 1.

CASE NOTES

Cited: *Hester v. Langston*, 297 Ark. 87, 759 S.W.2d 797 (1988).

5-54-122. Filing false report with law enforcement agency.

(a) As used in this section, "report" means any communication, either written or oral, sworn or unsworn.

(b) A person commits the offense of filing a false report if he or she files a report with any law enforcement agency or prosecuting attorney's office of any alleged criminal wrongdoing on the part of another person knowing that the report is false.

(c)(1) Filing a false report is a Class D felony if:

(A) The crime is a capital offense, Class Y felony, Class A felony, or Class B felony;

(B) The law enforcement agency or prosecuting attorney's office to whom the false report is made has expended in excess of five hundred dollars (\$500) in order to investigate the false report, including the costs of labor;

(C) Physical injury results to any person as a result of the false report;

(D) The false report is made in an effort by the person filing the false report to conceal his or her own criminal activity; or

(E) The false report results in another person being arrested.

(2) Otherwise, filing a false report is a Class A misdemeanor.

History. Acts 1989, No. 690, §§ 1-3.

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12
UALR L.J 617.

CASE NOTES

ANALYSIS

Construction.

Evidence.

Hearsay exceptions.

Informer.

Construction.

There can be a violation of this section even when the false statement is made by a person other than the one who actually calls the police to report the crime. *Stephens v. State*, 328 Ark. 570, 944 S.W.2d 836 (1997).

Evidence.

Defendant violated this section even though she did not make the call to the police regarding an alleged theft, where her false statements to the victim and the police were the sole links that connected another to the disappearance of money. *Stephens v. State*, 328 Ark. 570, 944 S.W.2d 836 (1997).

Where defendant initially told police that he saw a man murder the victim, then said that he himself shot the victim four times and, with the help of an accomplice, disposed of the body in a creek, and later stated to police that his own father

had killed the victim, resulting in his father's arrest, defendant's statements constituted filing a false report within the meaning of this section. *Curry v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 48 (Jan. 19, 2005).

Hearsay Exceptions.

Statement was not admissible under Evid. Rule 804(b)(3) as a statement against penal interest because it tended to subject declarant to prosecution under this section; this section does not punish the declarant who makes a true statement, only a false one, whereas admission of statement under Evid. Rule 804(b)(3) is based on the philosophy that the statement is true because its making may subject the declarant to civil or criminal liability. *Foreman v. State*, 321 Ark. 167, 901 S.W.2d 802 (1995).

Informer.

A citizen informant's tip ranked high on the probable cause reliability scale because he exposed himself to potential prosecution if he were to violate this section. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998).

5-54-123, 5-54-124. [Reserved.]**5-54-125. Fleeing.**

(a) If a person knows that his or her immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of the person to refrain from fleeing, either on foot or by means of any vehicle or conveyance.

(b) Fleeing is a separate offense and is not considered a lesser included offense or component offense with relation to other offenses which may occur simultaneously with the fleeing.

(c) Fleeing on foot is considered a Class C misdemeanor, except under the following conditions:

(1) If the defendant has been previously convicted of fleeing on foot anytime within the past one-year period, a subsequent fleeing on foot offense is a Class B misdemeanor;

(2) When property damage occurs as a direct result of the fleeing on foot, the fleeing on foot offense is a Class A misdemeanor;

(3) When serious physical injury occurs to any person as a direct result of the fleeing on foot, the fleeing on foot offense is a Class D felony.

(d)(1) Fleeing by means of any vehicle or conveyance is considered a Class A misdemeanor.

(2) Fleeing by means of any vehicle or conveyance is considered a Class D felony if, under circumstances manifesting extreme indifference to the value of human life, a person purposely operates the vehicle or conveyance in such a manner that creates a substantial danger of death or serious physical injury to another person.

(3) When serious physical injury to any person occurs as a direct result of fleeing by means of any vehicle or conveyance, the fleeing by means of any vehicle or conveyance offense is a Class C felony.

(e) Regardless of the circumstances in subdivisions (c)(1)-(3) of this section, if the defendant is under twenty-one (21) years of age and has not been previously convicted of fleeing, the offense of fleeing is a Class C misdemeanor.

(f) In addition to any other penalty, if the defendant is convicted of violating subsection (d) of this section, the court may instruct the Office of Driver Services of the Department of Finance and Administration to suspend or revoke the defendant's driver's license for a period of not more than one (1) year.

History. Acts 1977, No. 196, §§ 1, 2; A.S.A. 1947, §§ 41-2822, 41-2823; Acts 1993, No. 1217, § 1; 1995, No. 410, § 1.

CASE NOTES

ANALYSIS

Evidence.
Information.

Evidence.

Evidence sufficient to establish flight. *Johnson v. State*, 313 Ark. 308, 854 S.W.2d 336 (1993).

Evidence of "serious physical injury" held sufficient. *Witherspoon v. State*, 319 Ark. 313, 891 S.W.2d 371 (1995); *Weeks v. State*, 64 Ark. App. 1, 977 S.W.2d 241 (1998).

Where defendant ran a yield sign, narrowly escaped a collision, passed cars in a no-passing zone, drove on the wrong side of the street over a "blind" hill, ran two stop signs, lost control of his car when attempting to negotiate another turn and slid into a chain-link fence, evidence supported a charge of fleeing. *Pierce v. State*, 79 Ark. App. 263, 86 S.W.3d 1 (2002).

Evidence was sufficient to sustain defendant's fleeing conviction where a deputy saw a motorcycle run a stop sign and

attempted to make a traffic stop, the driver of the motorcycle fled reaching speeds approaching 90 miles per hour, the driver successfully escaped on foot, and the deputy testified that he was able to positively identify defendant as the driver of the motorcycle. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

Information.

Amending the information to read "serious physical injury" rather than "personal injury" to conform to the 1993 amendment of subdivision (c)(3) after prosecution had presented its case in chief changed neither the degree nor the nature of the offense charged, and thus no error occurred. *Witherspoon v. State*, 319 Ark. 313, 891 S.W.2d 371 (1995).

Cited: *Elmore v. State*, 13 Ark. App. 221, 682 S.W.2d 758 (1985); *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989); *Shaw v. State*, 299 Ark. 474, 773 S.W.2d 827 (1989); *Sherman v. State*, 326 Ark. 153, 931 S.W.2d 417 (1996); *Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998).

5-54-126. Killing or injuring animals used by law enforcement or search and rescue dogs.

(a)(1) Any person who, without just cause, purposely kills or injures any animal owned by or used by a law enforcement agency or any search and rescue dog is guilty of a Class D felony.

(2) "Search and rescue dog" means any dog:

(A) In training for or trained for the purpose of search and rescue;

(B) Owned by an independent handler or member of a search and rescue team; and

(C) Used in conjunction with a local law enforcement organization or an emergency services organization for the purpose of locating a missing person or evidence of arson.

(b) Any person guilty of violating subsection (a) of this section is also required to make restitution to the law enforcement agency or owner so aggrieved.

History. Acts 1985, No. 446, §§ 1, 2; A.S.A. 1947, §§ 41-2858, 41-2859; Acts 1987, No. 884, § 1; 1999, No. 571, § 1.

5-54-127. [Repealed.]

Publisher's Notes. This section, concerning an officer failing to execute process, was repealed by Acts 2005, No. 1994, § 520. The section was derived from Rev.

Stat., ch. 44, div. 5, art. 3, § 12; C. & M. Dig., § 2582; Pope's Dig., § 3262; A.S.A. 1947, § 41-2853.

5-54-128. [Repealed.]

Publisher's Notes. This section, concerning jailor refusing to receive prisoner, was repealed by Acts 1997, No. 1097, § 2. The section was derived from Rev. Stat.,

ch. 44, div. 5, art. 3, § 13; C. & M. Dig., § 2583; Pope's Dig., § 3263; A.S.A. 1947, § 41-2851.

For present law, see § 12-41-503.

5-54-129. Search of persons and vehicles entering institutions.

It is lawful for a superintendent, warden, or jailor, or his or her duly authorized agent, to require, as a condition of admission, a reasonable search as permitted by the Arkansas Constitution and the United States Constitution of the person or vehicle of anyone seeking admission to, or to visit in, the Department of Community Correction, jails, state institutions, or other places where persons are confined.

History. Acts 1953, No. 88, § 3; A.S.A. 1947, § 41-2852; Acts 2005, No. 1994, § 494.

Amendments. The 2005 amendment substituted "require, as a condition of admission, a reasonable search as permitted by the state and general constitutions of"

for "search," inserted "Community," deleted "reformatories, industrial schools, county penal farms" following "Correction" and substituted "places where persons are confined" for "places of confinement where prisoners are confined."

CASE NOTES**Strip Searches.**

While prison officials have the right to conduct reasonable searches of prison visitors, with far greater latitude than in other settings, the right to indiscriminately strip search anyone who enters is not and cannot be authorized. *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985).

Strip search of a mother who had been visiting her son on a weekly basis, without incident for several years and who had been strip searched before, and no contraband was ever discovered, was unreasonable and violated the Fourth Amendment to the U.S. Constitution. *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985).

5-54-130. Radio voice privacy adapters.

(a) It is unlawful for any person other than a law enforcement officer or law enforcement agency or fire department or employee of a law enforcement agency or fire department to own or operate or possess any radio equipment described as a voice privacy adapter or any other device capable of receiving and decoding police and fire department communications that have been transmitted through a voice privacy adapter.

(b) The provisions of this section does not apply to any police department or agency or any other agency having law enforcement responsibility nor to a fire department of any political subdivision of this state.

(c) Any person who violates any provision of this section is guilty of a violation and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

(d) As used in this section, “person” means any person, firm, corporation, association, club, copartnership, society, or any other organization.

History. Acts 1975, No. 973, §§ 1-4; A.S.A. 1947, §§ 41-2854 — 41-2857; Acts 2005, No. 1994, § 51.

Amendments. The 2005 amendment substituted “guilty of a violation” for “deemed guilty of a misdemeanor” in (c).

5-54-131. Absconding.

(a) A person commits the offense of absconding if the person knowingly:

(1) Leaves a designated residence while under house arrest ordered as a condition of the person’s release on a criminal offense by a court of competent jurisdiction; or

(2) Leaves a designated area while wearing an electronic monitoring device ordered as a condition of the person’s release on a criminal offense by a:

(A) Court of competent jurisdiction; or

(B)(i) Sheriff or his or her designee.

(ii) A determination by a sheriff or his or her designee placing a person on electronic monitoring remains valid until changed by the sheriff or his or her designee.

(b) The offense of absconding is a Class D felony.

History. Acts 1993, No. 473, § 1; 1999, No. 755, § 1.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 16 UALR L.J. 91.

5-54-132. Projecting a laser light on a law enforcement officer.

(a) It is unlawful for any person to knowingly cause a laser light beam, colored light beam, or other targeting, pointing, or spotting light beam, to be projected, displayed, or shined on a law enforcement officer while in the performance of the law enforcement officer’s duties.

(b) Any person violating a provision of this section is guilty of a Class A misdemeanor.

History. Acts 1999, No. 1271, § 1.

SUBCHAPTER 2 — TERRORISM

SECTION.	SECTION.
5-54-201. Definitions.	terial support for a terrorist act.
5-54-202. Soliciting material support for terrorism — Providing ma-	5-54-203. Making a terrorist threat.

SECTION.

5-54-204. Falsely communicating a terrorist threat.

5-54-205. Terrorism.

5-54-206. Terrorism — Enhanced penalties.

5-54-207. Hindering prosecution of terrorism.

SECTION.

5-54-208. Exposing the public to toxic biological, chemical, or radioactive substances.

5-54-209. Use of a hoax substance.

5-54-210. Restitution.

Effective Dates. Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas' criminal statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of

the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-54-201. Definitions.

As used in this subchapter:

(1) "Act of terrorism" means:

(A) Any act that causes or creates a risk of death or serious physical injury to five (5) or more persons;

(B) Any act that disables or destroys the usefulness or operation of any communications system;

(C) Any act or any series of two (2) or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, computers, computer programs, or data used by:

(i) Any industry;

(ii) Any class of business;

(iii) Five (5) or more businesses;

(iv) The United States Government;

(v) State government;

(vi) Any unit of local government;

(vii) A public utility;

(viii) A manufacturer of pharmaceuticals;

(ix) A national defense contractor; or

(x) A manufacturer of chemical or biological products used in connection with agricultural production;

(D) Any act that disables or causes substantial damage to or destruction of any structure or facility used in or in connection with:

(i) Ground, air, or water transportation;

(ii) The production or distribution of electricity, gas, oil, or other fuel;

(iii) The treatment of sewage or the treatment or distribution of water; or

(iv) Controlling the flow of any body of water;

(E) Any act that causes substantial damage to or destruction of livestock or crops or a series of two (2) or more acts committed in furtherance of a single intention, scheme, or design which, in the aggregate, causes substantial damage to or destruction of livestock or crops;

(F) Any act that causes substantial damage to or destruction of:

(i) Any hospital; or

(ii) Any building or facility used by:

(a) The United States Government;

(b) State government;

(c) Any unit of local government;

(d) A national defense contractor;

(e) A public utility; or

(f) A manufacturer of chemical or biological products used in or in connection with agricultural production or the storage or processing of agricultural products or the preparation of agricultural products for food or food products intended for resale or for feed for livestock; or

(G) Any act that causes damage of five hundred thousand dollars (\$500,000) to any building or set of buildings;

(2) "Agricultural products" means crops and livestock;

(3) "Agricultural production" means the breeding and growing of livestock and crops;

(4) "Biological products used in agriculture" means, but is not limited to, seeds, plants, and deoxyribonucleic acid (DNA) of plants or animals altered for use in crop or livestock breeding or production or which are sold, intended, designed, or produced for use in crop production;

(5) "Communications system" means any works, property, or material of any radio, telegraph, telephone, microwave, cable station, or system;

(6)(A) "Computer" means a device that accepts, processes, stores, retrieves, or outputs data.

(B) "Computer" includes, but is not limited to, auxiliary storage and telecommunications devices;

(7) "Computer network" means a set of related, remotely connected devices and any communications facilities including more than one (1) computer with the capability to transmit data among them through communication facilities;

(8) "Computer program" means a series of coded instructions or statements in a form acceptable to a computer that causes the computer to process data and supply the results of data processing;

(9)(A) "Data" means representations of information, knowledge, facts, concepts, or instructions, including program documentation, which are prepared in a formalized manner and are stored or processed in or transmitted by a computer.

(B) Data may be stored in any form including, but not limited to, magnetic or optical storage media, punch cards, or data stored internally in the memory of a computer;

(10) "Hoax substance" means any substance that would cause a reasonable person to believe that the substance is a:

- (A) Dangerous chemical or biological agent;
- (B) Poison;
- (C) Harmful radioactive substance; or
- (D) Similar substance;

(11) "Livestock" means animals bred or raised for human consumption;

(12) "Material support or resources" means:

- (A) Currency or other financial securities;
- (B) Financial services;
- (C) Lodging;
- (D) Training;
- (E) Safe house;
- (F) False documentation or identification;
- (G) Communications equipment;
- (H) Facilities;
- (I) Weapons;
- (J) Lethal substances;
- (K) Explosives;
- (L) Personnel;
- (M) Transportation;
- (N) Expert services or expert assistance; and
- (O) Any other kind of physical assets or intangible property;

(13)(A) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(B) "Person" includes, without limitation, any:

(i) Charitable organization, whether incorporated or unincorporated;

(ii) Professional fund raiser, professional solicitor, limited liability company, association, joint stock company, trust, trustee, or any group of people formally or informally affiliated or associated for a common purpose; and

(iii) Officer, director, partner, member, or agent of any person;

(14) "Render criminal assistance" means to do any of the following with the purpose of preventing, hindering, or delaying the discovery or apprehension of a person whom he or she knows or believes has committed an offense under this subchapter or is being sought by law enforcement officials for the commission of an offense under this subchapter, or with the purpose to assist a person in profiting or benefiting from the commission of an offense under this subchapter:

- (A) Harbor or conceal the person;
- (B) Warn the person of impending discovery or apprehension;
- (C) Provide the person with:
 - (i) Money;

(ii) Transportation;

(iii) A weapon;

(iv) A disguise;

(v) False identification documents; or

(vi) Any other means of avoiding discovery or apprehension;

(D) Prevent or obstruct, by means of force, intimidation, or deception, anyone from performing an act that might aid in the discovery or apprehension of the person;

(E) Suppress, by any act of concealment, alteration, or destruction, any physical evidence that might aid in the discovery or apprehension of the person or in the lodging of a criminal charge against the person;

(F) Aid the person to protect or expeditiously profit from an advantage derived from the crime; or

(G)(i) Provide expert services or expert assistance to the person.

(ii) Providing expert services or expert assistance shall not be construed to apply to:

(a) A licensed attorney who discusses with a client the legal consequences of a proposed course of conduct or advises a client of legal or constitutional rights; or

(b) Licensed medical personnel who provide emergency medical treatment to a person whom the doctor believes committed an offense under this subchapter if, as soon as reasonably practicable either before or after providing the treatment, the doctor notifies a law enforcement agency; and

(15) "Terrorist" means any person who engages in or is about to engage in a terrorist act with the purpose to intimidate or coerce a significant portion of the civilian population or influence the policy of a government or a unit of government.

History. Acts 2003, No. 1342, § 3.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Law, Arkansas Anti-Terrorism Act of Arkansas General Assembly, Criminal 2003, 26 UALR L.J. 374.

5-54-202. Soliciting material support for terrorism — Providing material support for a terrorist act.

(a)(1)(A) A person commits the offense of soliciting material support for terrorism if the person knowingly raises, solicits, or collects material support or resources knowing:

(i) That the material support or resources will be used, in whole or in part, to plan, prepare, carry out, or avoid apprehension for committing terrorism or causing a catastrophe as defined under § 5-38-202; or

(ii) That the material support or resources so raised, solicited, or collected will be used by an organization designated under 8 U.S.C.

§ 1189, as the list of organizations existed March 1, 2003, and that designates foreign terrorist organizations.

(B) It is not an element of the offense that the defendant knows that an organization has been designated under 8 U.S.C. § 1189, as it existed March 1, 2003.

(2) Soliciting material support for terrorism is a Class Y felony.

(b)(1) A person commits the offense of providing material support for a terrorist act if the person knowingly provides material support or resources to a person knowing that the person will use the material support or resources, in whole or in part, to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism or to cause a catastrophe as defined under § 5-38-202.

(2) Providing material support for a terrorist act is a Class Y felony.

History. Acts 2003, No. 1342, § 3.

5-54-203. Making a terrorist threat.

(a) A person commits the offense of making a terrorist threat if, with the purpose to intimidate or coerce a civilian population or to influence the policy of a government or a unit of government by intimidation or coercion, the person in any manner knowingly threatens to commit or causes to be committed a terrorist act and thereby causes a reasonable expectation or fear of the imminent commission of a terrorist act or of another terrorist act.

(b) It is not a defense to a prosecution under this section that at the time the person made the terrorist threat, unknown to him or her it was impossible to carry out the threat, nor is it a defense that the threat was not made to a person who was a subject or intended victim of the threatened act.

(c) Making a terrorist threat is a Class A felony.

History. Acts 2003, No. 1342, § 3.

5-54-204. Falsely communicating a terrorist threat.

(a) A person commits the offense of falsely communicating a terrorist threat if, in any manner, the person knowingly makes a threat to commit or cause to be committed a terrorist act or otherwise creates the impression or belief that a terrorist act is about to be or has been committed or in any manner knowingly makes a threat to commit or cause to be committed a catastrophe, as defined under § 5-38-202, that the person knows is false.

(b) Falsely communicating a terrorist threat is a Class B felony.

History. Acts 2003, No. 1342, § 3.

5-54-205. Terrorism.

(a) A person commits the offense of terrorism if, with the intent to intimidate or coerce a civilian population, influence the policy of a unit

of government by using intimidation or coercion, affect the conduct of a unit or level of government by intimidation or coercion, or retaliate against a civilian population or unit of government for a policy or conduct, the person:

- (1) Knowingly commits an act of terrorism within this state; or
 - (2) While outside this state, knowingly commits an act of terrorism that takes effect within this state or produces substantial detrimental effects within this state.
- (b) Terrorism is a Class Y felony.

History. Acts 2003, No. 1342, § 3.

5-54-206. Terrorism — Enhanced penalties.

(a) Any person who is found guilty of or who pleads guilty or nolo contendere to terrorism, § 5-54-205, may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the person's acts caused serious physical injury to a law enforcement officer, firefighter, or emergency service technician providing emergency assistance at the scene of the act of terrorism.

(b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person sentenced under this section is not eligible for early release on parole for the enhanced portion of the sentence.

History. Acts 2003, No. 1342, § 3.

5-54-207. Hindering prosecution of terrorism.

(a) A person commits the offense of hindering prosecution of terrorism if the person renders criminal assistance to a person who has committed terrorism, § 5-54-205, or causing a catastrophe, § 5-38-202, when he or she knows that the person to whom he or she rendered criminal assistance engaged in an act of terrorism or caused a catastrophe.

(b)(1) Hindering prosecution of terrorism is a Class B felony.

(2) However, hindering prosecution of terrorism is a Class D felony if the defendant shows by a preponderance of the evidence that he or she stands to the person assisted in the relation of:

- (A) Parent, child, brother, or sister or a corresponding step-relationship of the preceding relationships; or
- (B) Husband and wife.

History. Acts 2003, No. 1342, § 3.

5-54-208. Exposing the public to toxic biological, chemical, or radioactive substances.

(a) A person commits the offense of exposing the public to toxic biological, chemical, or radioactive substances if the person knowingly delivers or causes the delivery of a biological, chemical, or radioactive

substance to a governmental facility, school, business, hospital, office building, or similar facility open to the public with the purpose of causing bodily injury or evacuation of the facility.

(b) Exposing the public to toxic biological, chemical, or radioactive substances is a Class Y felony.

History. Acts 2003, No. 1342, § 3.

5-54-209. Use of a hoax substance.

(a) A person commits the offense of use of a hoax substance if the person knowingly delivers or causes the delivery of a hoax substance to a governmental facility, school, business, hospital, office building, or similar facility open to the public, or to a person's home, business, or place of work with the purpose of causing anxiety, unrest, fear, personal discomfort, or the evacuation of the facility.

(b) Use of a hoax substance is a Class D felony.

History. Acts 2003, No. 1342, § 3.

5-54-210. Restitution.

In addition to any other restitution ordered under § 5-4-205, the court may order that a person who violates this subchapter make restitution to the state or any of its political subdivisions for any cleanup costs associated with the commission of any offense in this subchapter.

History. Acts 2003, No. 1342, § 3.

CHAPTER 55

FRAUD AGAINST THE GOVERNMENT

SUBCHAPTER.

1. MEDICAID FRAUD ACT.
2. ILLEGAL FOOD COUPONS.
3. CLAIMS FOR BENEFITS.
4. PENALTIES FOR PLACING NAME OF ANOTHER PERSON ON PROPERTY ASSESSMENT TO AVOID FEES.

A.C.R.C. Notes. This chapter was formerly entitled "Medicaid Fraud."

Preambles. Acts 1979, No. 823, contained a preamble which read: "Whereas, the Attorney General and the Prosecuting Attorneys need specific legislation by which to eliminate fraud in the Arkansas Medicaid Program; and

"Whereas, the Commissioner of Arkansas Social Services, the Attorney General and the Prosecuting Attorneys need access to all Medicaid-related records of all recipients of benefits and/or claimants for

payments under the Arkansas Medicaid Program;

"Now, therefore ..."

Effective Dates. Acts 1979, No. 823, § 13: Apr. 10, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate fraud in the Arkansas Medicaid Program and that immediate passage of this Act is necessary to protect the integrity of the program.

Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 1291, § 13: Apr. 22, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate fraud in the Arkansas Medicaid Program and that immediate passage of this Act is necessary to protect the integrity of the program. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preser-

vation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1993, No. 1300, § 5: Apr. 23, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Attorney General and the prosecuting attorneys are in need of specific legislation by which to eliminate fraud in the Arkansas Medicaid Program and that immediate passage of this act is necessary to protect the integrity of the program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

CASE NOTES

Cited: United States v. Brown, 763 F.2d 984 (8th Cir. 1985).

SUBCHAPTER 1 — MEDICAID FRAUD ACT

- SECTION.
- 5-55-101. Title.
 - 5-55-102. Definitions.
 - 5-55-103. Unlawful acts — Classification.
 - 5-55-104. Records.
 - 5-55-105. Liability of organizations.
 - 5-55-106. Investigation by Attorney General.
 - 5-55-107. Restitution.
 - 5-55-108. Civil penalties — Expenses.
 - 5-55-109. Criminal penalties and civil

- SECTION.
- penalties mutually exclusive.
 - 5-55-110. Suspension of violators.
 - 5-55-111. Criminal acts constituting medicaid fraud.
 - 5-55-112. Disposition of offenders.
 - 5-55-113. Reward for the detection and punishment of medicaid fraud.
 - 5-55-114. Special deputy prosecutor.

A.C.R.C. Notes. Due to the addition of Subchapter 3 by Acts 1995, No. 862, and the transfer of former § 5-56-101 et seq. to be Subchapter 2, the preexisting provisions of this chapter have been designated as Subchapter 1.

Effective Dates. Acts 2003, No. 1122, § 2: Apr. 7, 2003. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the Medicaid Fraud Act is in immediate need of the revision to clarify an ambiguity in the law; and that the

provisions of this act are essential to successful operations and activities of the Medicaid Fraud Control Unit and the Department of Human Services. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is

vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-55-101. Title.

This subchapter shall be known and may be cited as the "Medicaid Fraud Act".

History. Acts 1979, No. 823, § 1;
A.S.A. 1947, § 41-4401.

5-55-102. Definitions.

As used in this subchapter:

(1) "Arkansas Medicaid Program" means the program authorized under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., provides for payments for medical goods or services on behalf of indigent families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services;

(2) "Claim" means any written or electronically submitted request or demand for reimbursement made to the Arkansas Medicaid Program by any provider or its fiscal agents for each good or service purported to have been provided to any medicaid recipient whether or not the State of Arkansas provides any or no portion of the money that is requested or demanded;

(3) "Fiscal agents" means any individual, firm, corporation, professional association, partnership, organization, or other legal entity that, through a contractual relationship with the Department of Health and Human Services and, thereby, the State of Arkansas receives, processes, and pays claims under the Arkansas Medicaid Program;

(4) "Medicaid recipient" means any individual in whose behalf any person claimed or received any payment from the Arkansas Medicaid Program or its fiscal agents, whether or not the individual was eligible for benefits under the Arkansas Medicaid Program;

(5) "Person" means any:

(A) Provider of goods or services under the Arkansas Medicaid Program or any employee of the provider, whether the provider be an individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity; or

(B) Individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity, or any employee of any individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity, not a provider under the Arkansas Medicaid Program but that provides goods or services to a provider under the Arkansas Medicaid Program for which the provider submits claims to the Arkansas Medicaid Program or its fiscal agents; and

(6) "Records" means all documents including, but not limited to, medical documents and X rays, developed by any person through the claimed provision of any goods or services to any medicaid recipient.

History. Acts 1979, No. 823, § 2; A.S.A. 1947, § 41-4402; Acts 1993, No. 1291, §§ 1, 8.

5-55-103. Unlawful acts — Classification.

(a)(1) It is unlawful for any person to commit medicaid fraud as defined in this subchapter, and any person found to have committed any such act or acts is deemed guilty of medicaid fraud.

(2) Medicaid fraud is a:

(A) Class B felony if the aggregate amount of payments illegally claimed is two thousand five hundred dollars (\$2,500) or more; and

(B) A Class C felony if the aggregate amount of payments illegally claimed is less than two thousand five hundred dollars (\$2,500) but more than two hundred dollars (\$200).

(3) Otherwise, medicaid fraud is a Class A misdemeanor.

(b)(1) A person commits illegal medicaid participation if:

(A) Having been found guilty of or having pleaded guilty or nolo contendere to the charge of medicaid fraud, theft of public benefits, § 5-36-202, or abuse of adults, § 5-28-101 et seq., as defined in the Arkansas Criminal Code, § 5-1-101 et seq., that person participates directly or indirectly in the Arkansas Medicaid Program; or

(B) As a certified health provider, enrolled in the Arkansas Medicaid Program pursuant to Title XIX of the Social Security Act, as amended, 42 U.S.C. § 1396 et seq., or the fiscal agent of the certified health provider, employs, or engages as an independent contractor, or engages as a consultant, or otherwise permits the participation in the business activities of the certified health provider, any person who has pleaded guilty or nolo contendere to or has been found guilty of a charge of medicaid fraud, theft of public benefits, § 5-36-202, or abuse of adults, § 5-28-101 et seq., as defined in the Arkansas Criminal Code § 5-1-101 et seq.

(2) Illegal medicaid participation is a:

(A) Class A misdemeanor for the first offense;

(B) Class D felony for the second offense; and

(C) Class C felony for the third offense and subsequent offenses.

History. Acts 1979, No. 823, § 3; A.S.A. 1947, § 41-4403; Acts 1993, No. 1291, § 2; 2003, No. 1122, § 1.

Amendments. The 2003 amendment

redesignated former (a), (b)(1) and (b)(2) as present (a)(1), (a)(2) and (a)(3) respectively; added present (b); and made minor stylistic changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal

Law, Fraud Against Government, 26 UALR L.J. 373.

5-55-104. Records.

(a) No potential medicaid recipient is eligible for medical assistance unless he or she has authorized in writing the Director of the Department of Health and Human Services to examine all records of the potential medicaid recipient's own, or of those receiving or having received medicaid benefits through him or her, whether or not the receipt of the benefits would be allowed by the Arkansas Medicaid Program, for the purpose of investigating whether any person may have committed the crime of Medicaid fraud or for use or potential use in any legal, administrative, or judicial proceeding.

(b) No person is eligible to receive any payment from the Arkansas Medicaid Program or its fiscal agents unless the person has authorized in writing the director to examine all records for the purpose of investigating whether any person may have committed the crime of medicaid fraud or for use or for potential use in any legal, administrative, or judicial proceeding.

(c) The Attorney General and the prosecuting attorneys are allowed access to all records of persons and medicaid recipients under the Arkansas Medicaid Program to which the director has access for the purpose of investigating whether any person may have committed the crime of medicaid fraud or for use or potential use in any legal, administrative, or judicial proceeding.

(d) Notwithstanding any other law to the contrary, no person is subject to any civil or criminal liability for providing access to records to the director, the Attorney General, or the prosecuting attorneys.

(e) Records obtained by the director, the Attorney General, or the prosecuting attorneys pursuant to this subchapter are classified as confidential information and are not subject to outside review or release by any individual except when records are used or potentially to be used by any government entity in any legal, administrative, or judicial proceeding.

(f) All persons under the Arkansas Medicaid Program are required to maintain at their principal place of medicaid business all records at least for a period of five (5) years from the date of claimed provision of any goods or services to any medicaid recipient.

(g)(1) Any person found not to have maintained any records is guilty of a Class D felony if the unavailability of records impairs or obstructs the prosecution of a felony.

(2) Otherwise, the unavailability of records is a Class A misdemeanor.

History. Acts 1979, No. 823, § 10; A.S.A. 1947, § 41-4410; Acts 1993, No. 1291, §§ 3, 7.

CASE NOTES

ANALYSIS

Consent.

Inspection of records.

Consent.

Since this section and regulations clearly contemplate that audits may be conducted pursuant to a criminal investigation and since the pharmacy had at least constructive, if not actual, knowledge of the statute and agency policies and yet entered the contract and continued to participate in the program, they expressly consented to an inspection of their records undertaken to determine if they were committing Medicaid fraud. *United States v. Brown*, 763 F.2d 984 (8th Cir. 1985), cert. denied, 474 U.S. 905, 106 S. Ct. 273, 88 L. Ed. 2d 234 (1985).

Inspection of Records.

Since pharmacy expressly consented to

an audit of its records, even if undertaken in the course of a criminal investigation, the warrantless inspection of its records was valid and could not have tainted a later search and seizure. *United States v. Brown*, 763 F.2d 984 (8th Cir. 1985), cert. denied, 474 U.S. 905, 106 S. Ct. 273, 88 L. Ed. 2d 234 (1985).

The search and seizure of documentary evidence at a dentist's office did not violate the Fourth Amendment where the dentist had previously executed a contract with the state which provided that he would keep all records as provided by the state's provider manual, that he would disclose the extent of services provided to individuals (patients) receiving assistance under the Medicaid program, and that he would make all of his records available in order to satisfy audit requirements under the program. *Blackwell v. State*, 338 Ark. 671, 1 S.W.3d 399 (1999).

5-55-105. Liability of organizations.

In naming a person as a defendant under this subchapter, it is expressly intended that all of the provisions of §§ 5-2-501 — 5-2-503 apply.

History. Acts 1979, No. 823, § 5; A.S.A. 1947, § 41-4405.

5-55-106. Investigation by Attorney General.

The office of the Attorney General is the entity to which a case of suspected medicaid fraud shall be referred by the Arkansas Medicaid Program or its fiscal agents for the purposes of investigation, civil action, or referral to the prosecuting attorney having criminal jurisdiction in the matter.

History. Acts 1979, No. 823, § 9; A.S.A. 1947, § 41-4409; Acts 1995, No. 894, § 2.

5-55-107. Restitution.

(a) In addition to any other fine that may be levied under § 5-4-201, any person found guilty of medicaid fraud as described in this subchapter is required to:

(1) Make full restitution to the Department of Health and Human Services; and

(2)(A) Pay a mandatory fine in the amount of three (3) times the amount of all payments judicially found to have been illegally received from the Arkansas Medicaid Program or its fiscal agents.

(B) The mandatory fine shall be credited to the general revenues of the State of Arkansas.

(b)(1) In addition to any other fine mandated by this subchapter or that may be levied under § 5-4-201, any person found guilty of medicaid fraud as described in this subchapter may be required to pay a fine into the State Treasury in any amount up to three thousand dollars (\$3,000) for each claim judicially found to be fraudulently submitted to the Arkansas Medicaid Program or its fiscal agents.

(2) A fine under subdivision (b)(1) of this section shall be credited to the general revenues of the State of Arkansas.

(c) For prosecutions brought under this chapter, the following provisions apply:

(1) To enable the court to properly fix the amount of restitution, the prosecuting attorney after appropriate investigation, shall recommend an amount that would make the Arkansas Medicaid Program whole with respect to the money fraudulently received from the Arkansas Medicaid Program, including the expense of investigation and all other measurable monetary damages directly related to the offense;

(2) If the defendant disagrees with the recommendation of the prosecuting attorney, he or she is entitled to introduce evidence in mitigation of the amount recommended; and

(3) The monetary judgment for restitution, as provided in this subchapter, becomes a judgment against the offender and has the same force and effect as any other civil judgment recorded in this state.

(d)(1) The Attorney General has concurrent jurisdiction and authority with the prosecuting attorney to collect all fines and amounts of restitution levied pursuant to any criminal violation of this subchapter in the manner provided by § 5-4-204, with interest accruing on any amount of restitution to be made and any fine to be paid from and after default in the payment of the restitution or fine in the manner provided in § 16-65-114.

(2) However, this subsection is not in any way intended to affect the contempt power of any court.

History. Acts 1979, No. 823, § 4; **Cross References.** Medicaid Fraud A.S.A. 1947, § 41-4404; Acts 1993, No. 1291, § 4. False Claims Act, § 20-77-901 et seq.

5-55-108. Civil penalties — Expenses.

(a)(1) Any person against which any civil judgment is entered as the result of a civil action brought or threatened to be brought by the State of Arkansas, through the Attorney General, on a complaint alleging the person to have fraudulently received any payment from the Arkansas Medicaid Program or its fiscal agents, is required to pay a civil penalty in the amount of two (2) times the amount of all payments judicially

found to have been fraudulently received from the Arkansas Medicaid Program or its fiscal agents.

(2) Any penalty shall be paid into the State Treasury and credited to the General Fund.

(3) The judgment upon which the civil penalty is based shall be paid as restitution to the Department of Health and Human Services.

(b)(1) Any person against which any civil judgment is entered as the result of a civil action brought or threatened to be brought by the State of Arkansas, through the Attorney General, on a complaint alleging the person to have fraudulently submitted any claim to the Arkansas Medicaid Program or its fiscal agents, may be required to pay a civil penalty into the State Treasury in any amount up to two thousand dollars (\$2,000) for each claim judicially found to have been fraudulently submitted to the Arkansas Medicaid Program or its fiscal agents.

(2) The entirety of the civil penalty shall be credited to the General Fund.

(c)(1) Any person against which any civil judgment is entered as the result of a civil action brought or threatened to be brought by the State of Arkansas, through the Attorney General, on a complaint alleging any fraudulent receipt of payment from or false claim submitted to the Arkansas Medicaid Program or its fiscal agents, may be required to pay into the State Treasury all reasonable expenses that the court determines have been necessarily incurred by the Attorney General in the enforcement of this subchapter.

(2) The entirety of the amount under subdivision (c)(1) of this section shall be credited to the General Fund.

History. Acts 1979, No. 823, § 6;
A.S.A. 1947, § 41-4406.

5-55-109. Criminal penalties and civil penalties mutually exclusive.

Section 5-55-107, which provides for additional criminal fines, and the Medicaid Fraud False Claims Act, § 20-77-901 et seq., which provides for civil penalties, shall not both be applied to the same payment received or claim made by any person under the Arkansas Medicaid Program or its fiscal agents.

History. Acts 1993, No. 1291, § 6.

Publisher's Notes. Former § 5-55-109, concerning the mutual exclusivity of criminal penalties and civil penalties, was

repealed by Acts 1993, No. 1291, § 8. The former section was derived from Acts 1979, No. 823, § 7; A.S.A. 1947, § 41-4407.

5-55-110. Suspension of violators.

The Director of the Department of Health and Human Services may suspend or revoke the provider agreement between the Department of Health and Human Services and a person in the event the person is found guilty of violating a provision of this subchapter.

History. Acts 1979, No. 823, § 8;
A.S.A. 1947, § 41-4408; Acts 1993, No.
1291, § 5.

5-55-111. Criminal acts constituting medicaid fraud.

A person commits medicaid fraud when he or she:

(1) Purposely makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under the Arkansas Medicaid Program;

(2) At any time purposely makes or causes to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment under the Arkansas Medicaid Program;

(3) Having knowledge of the occurrence of any event affecting his or her initial or continued right to any benefit or payment under the Arkansas Medicaid Program, or the initial or continued right to any benefit or payment under the Arkansas Medicaid Program of any other individual in whose behalf he or she has applied for or is receiving the benefit or payment under the Arkansas Medicaid Program, purposely conceals or fails to disclose the event with an intent fraudulently to secure the benefit or payment under the Arkansas Medicaid Program either in a greater amount or quantity than is due or when no benefit or payment under the Arkansas Medicaid Program is authorized;

(4) Having made application to receive any benefit or payment under the Arkansas Medicaid Program for the use and benefit of another person and having received it, purposely converts the benefit or payment under the Arkansas Medicaid Program or any part of the benefit or payment under the Arkansas Medicaid Program to a use other than for the use and benefit of the other person;

(5) Purposely presents or causes to be presented a claim for a physician's service for which payment may be made under a program under the Arkansas Medicaid Program while knowing that the individual who furnished the service was not licensed as a physician;

(6) Purposely solicits or receives any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind:

(A) In return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid Program; or

(B) In return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid Program;

(7)(A) Purposely offers or pays any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, to any person to induce that person to:

(i) Refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid Program; or

(ii) Purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid Program.

(B) Subdivisions (7)(A)(i) and (ii) of this section do not apply to:

(i) A discount or other reduction in price obtained by a provider of services or other entity under the Arkansas Medicaid Program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under the Arkansas Medicaid Program;

(ii) Any amount paid by an employer to an employee who has a bona fide employment relationship with the employer for employment in the provision of covered items or services;

(iii) Any amount paid by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under the Arkansas Medicaid Program if:

(a) The person has a written contract with each individual or entity that specifies the amount to be paid to the person and the amount may be a fixed amount or a fixed percentage of the value of the purchases made by each individual or entity under the contract; and

(b) In the case of an entity that is a provider of services as defined in § 20-9-101, the person discloses in such form and manner as the Director of the Department of Health and Human Services requires to the entity and, upon request, to the director the amount received from each vendor with respect to purchases made by or on behalf of the entity; or

(iv) Any payment practice specified by the director promulgated pursuant to applicable federal or state law;

(8) Purposely makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operation of any institution, facility, or entity in order that the institution, facility, or entity may qualify either upon initial certification or upon recertification as a hospital, rural primary care hospital, skilled nursing facility, nursing facility, intermediate care facility for the mentally retarded, home health agency, or other entity, including an eligible organization under applicable federal law for which certification is required, or with respect to information required pursuant to applicable federal and state law, rules, regulations, and provider agreements;

(9) Purposely:

(A) Charges, for any service provided to a patient under the Arkansas Medicaid Program, money or other consideration at a rate in excess of the rates established by the state; or

(B) Charges, solicits, accepts, or receives, in addition to any amount otherwise required to be paid under the Arkansas Medicaid Program, any gift, money, donation, or other consideration other than

a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the patient:

(i) As a precondition of admitting a patient to a hospital, nursing facility, or intermediate care facility for the mentally retarded; or

(ii) As a requirement for the patient's continued stay in a hospital, nursing facility, or intermediate care facility for the mentally retarded when the cost of the services provided in the hospital, nursing facility, or intermediate care facility for the mentally retarded to the patient is paid for in whole or in part under the Arkansas Medicaid Program; or

(10) Purposely makes or causes to be made any false statement or representation of a material fact in any application for a benefit or payment in violation of the rules, regulations, and provider agreements issued by the Arkansas Medicaid Program or its fiscal agents.

History. Acts 1993, No. 1291, § 6.

Cross References. Medicaid Fraud False Claims Act, § 20-77-901 et seq.

CASE NOTES

In General.

Where several doctors challenged a hospital's economic credentialing policy by suing under the Anti-Kickback Statute, 42 U.S.C.S. § 1320a-7b(b), the Arkansas Medicaid Fraud Act, § 5-55-111, the Arkansas Medicaid Fraud False Claims Act, § 20-77-902, and the Arkansas Deceptive Trade Practices Act, § 4-88-101 et seq., the hospital's fed. R. Civ. P. 12(b)(1) mo-

tion was granted; the doctor's right to relief under state law was not based on a resolution of a question of disputed federal law, and Arkansas law did not require a determination of the Anti-Kickback Statute in order for them to prevail on any of the state law claims asserted. *Murphy v. Health*, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 12080 (E.D. Ark. Feb. 23, 2004).

5-55-112. Disposition of offenders.

For a prosecution under this subchapter:

(1) The punishment shall be fixed by the finder of fact, whether a court or a jury; and

(2) Restitution shall be fixed by the court.

History. Acts 1993, No. 1291, § 6; 2005, No. 164, § 1.

Amendments. The 2005 amendment substituted "the punishment shall be fixed by the finder of fact, whether a court

or a jury, and restitution shall be fixed by the court" for "whether a case is tried by the court or a jury, the punishment and restitution shall be fixed by the court."

5-55-113. Reward for the detection and punishment of medicaid fraud.

(a) The court may pay a person such sums, not exceeding ten percent (10%) of the aggregate penalty recovered, or in any case not more than one hundred thousand dollars (\$100,000), as the court may deem just, for information the person may have provided which led to detecting

and bringing to trial and punishment a person guilty of violating the medicaid fraud laws.

(b)(1) Upon the disposition of any criminal action relating to a violation of this subchapter in which a penalty is recovered, the Attorney General may petition the court on behalf of a person who may have provided information that led to detecting and bringing to trial and punishment a person guilty of medicaid fraud to award the person in an amount commensurate with the quality and usefulness of the information determined by the court to have been provided, in accordance with the requirements of this subchapter.

(2) If the Attorney General elects not to petition the court on behalf of the person, the person may petition the court on his or her own behalf.

(c) Neither the state nor any defendant within the action is liable for expenses that a person incurs in bringing an action under this section.

(d) An employee or fiscal agents charged with the duty of referring or investigating a case of medicaid fraud who are employed by or contract with any governmental entity are not eligible to receive a reward under this section.

History. Acts 1993, No. 1300, § 1.

5-55-114. Special deputy prosecutor.

(a) An attorney employed by the office of the Attorney General may be designated a special deputy prosecutor by the prosecuting attorney having criminal jurisdiction in the matter for the purposes of prosecuting in a court of competent jurisdiction an action brought under this subchapter.

(b)(1) As a special deputy prosecutor, the attorney may issue a subpoena and may administer an oath as provided in § 25-16-705.

(2) The subpoena shall be substantially in the form set forth in § 25-16-705(b).

(c) A special deputy prosecutor appointed and functioning as authorized under this section is entitled to the same immunity granted by law to the prosecuting attorney.

(d)(1) Appointment as a special deputy prosecutor does not enable the attorney to receive any additional fees or salary from the state for services provided pursuant to the appointment.

(2) Expenses of the special deputy prosecutor and any fees and costs incurred by the special deputy prosecutor in the prosecution of cases as provided in this section are the responsibility of the Attorney General.

(e) The prosecuting attorney may revoke the appointment of a special deputy prosecutor at any time.

History. Acts 1995, No. 894, § 2.

SUBCHAPTER 2 — ILLEGAL FOOD COUPONS

SECTION.

- 5-55-201. Traffic in illegal food coupons or vouchers.
- 5-55-202. Illegal use, transfer, acquisition, or possession of vouchers.
- 5-55-203. Illegal presentation of food coupons or vouchers for payment.

SECTION.

- 5-55-204. Penalties for food stamp trafficking.
- 5-55-205. Abuse of Special Supplemental Food Program for Women, Infants and Children.

A.C.R.C. Notes. This subchapter was formerly codified as § 5-56-101 et seq.

Due to the addition of Subchapter 3 by Acts 1995, No. 862, and the transfer of former § 5-56-101 et seq. to this subchapter, the preexisting provisions of this chapter have been designated as Subchapter 1.

Effective Dates. Acts 1997, No. 1058, § 33: July 1, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the United States Congress has amended the laws pertaining to certain federally funded public assistance pro-

grams; that these programs are crucial to the life and health of many needy citizens of the State of Arkansas who otherwise will be unable to obtain food, clothing, shelter, or medical care; that federal law mandates participating states to implement new public assistance programs on or before July 1, 1997, or forfeit federal funding necessary for such programs; that this act so provides. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect on July 1, 1997."

5-55-201. Traffic in illegal food coupons or vouchers.

(a)(1) Any individual, partnership, corporation, or other legal entity that issues food coupons in a manner not authorized by federal law and regulations or state law and regulations or that uses, transfers, acquires, possesses, or presents any food coupons for payment not authorized by federal and state law or federal and state regulations is guilty of a Class D felony.

(2) However, if the food coupons are of a value of less than one hundred dollars (\$100), the individual, partnership, corporation, or other legal entity is guilty of a Class A misdemeanor.

(b) Any individual, partnership, corporation, or other legal entity that issues a voucher used in the federal Special Supplemental Food Program for Women, Infants and Children in a manner not authorized by federal law and regulations or state law and regulations or that uses, transfers, acquires, possesses, or presents any voucher used in the federal Special Supplemental Food Program for Women, Infants and Children for payment not authorized by federal and state law or federal and state regulations is guilty of a Class A misdemeanor.

(c) As used in this subchapter, "food coupons" means any printed material, magnetically encoded instrument, or other device or process issued by the Department of Health and Human Services or its

successors, the purpose of which is to permit the purchase of food as provided for by the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq., or regulations promulgated pursuant to the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq.

History. Acts 1979, No. 714, § 1; A.S.A. 1947, § 41-4301; Acts 1993, No. 489, § 1; 1995, No. 126, § 1; 1995, No. 345, § 1; 2005, No. 1994, § 426.

A.C.R.C. Notes. This section was formerly codified as § 5-56-101.

Amendments. The 2005 amendment deleted “and shall, upon conviction, be fined not more than ten thousand dollars

(\$10,000) or imprisoned for not more than five (5) years, or both” following “Class D felony” in (a); and deleted “and shall, upon conviction thereof, be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year, or both” following “Class A misdemeanor” in (a) and (c).

5-55-202. Illegal use, transfer, acquisition, or possession of vouchers.

Any person who knowingly uses, transfers, acquires, or possesses vouchers in any manner not authorized by the federal Special Supplemental Food Program for Women, Infants and Children authorized by the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., as amended, or federal and state regulations issued pursuant to the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., if the vouchers are of a value of less than one hundred dollars (\$100), is guilty of a Class A misdemeanor.

History. Acts 1979, No. 714, § 2; A.S.A. 1947, § 41-4302; Acts 1993, No. 489, § 2; 2005, No. 1994, § 222.

A.C.R.C. Notes. This section was formerly codified as § 5-56-102.

Amendments. The 2005 amendment

deleted “and shall, upon conviction thereof, be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year, or both” following “Class A misdemeanor.”

5-55-203. Illegal presentation of food coupons or vouchers for payment.

(a)(1) Any person who presents or causes to be presented food coupons for payment or redemption of the value of one hundred dollars (\$100) or more knowing the food coupons to have been received, transferred, or used in any manner in violation of a provision of the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq., or the federal or state regulations issued pursuant to the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq., is guilty of a Class D felony

(2) However, if the food coupons are of a value of less than one hundred dollars (\$100), the person is guilty of a Class A misdemeanor.

(b) Any person who presents or causes to be presented vouchers for payment or redemption of the value of one hundred dollars (\$100) or more knowing the vouchers to have been received, transferred, or used in any manner in violation of a provision of the federal Special Supplemental Food Program for Women, Infants and Children authorized by the Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., as amended, or the federal or state regulations issued pursuant to the

Child Nutrition Act of 1966, 42 U.S.C. § 1771 et seq., is guilty of a Class A misdemeanor.

History. Acts 1979, No. 714, § 3; A.S.A. 1947, § 41-4303; Acts 1993, No. 489, § 3; 2005, No. 1994, § 427.

A.C.R.C. Notes. This section was formerly codified as § 5-56-103.

Amendments. The 2005 amendment deleted “and shall, upon conviction, be fined not more than ten thousand dollars

(\$10,000) or imprisoned for not more than five (5) years, or both” following “Class D felony” in (a); and deleted “and shall, upon conviction, be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one (1) year, or both” following “Class A misdemeanor” in (a) and (b).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-55-204. Penalties for food stamp trafficking.

In addition to the penalties set forth in this subchapter, any recipient of a food stamp found guilty of a violation set forth in this subchapter is ineligible for further participation in the food stamp program, as follows:

- (1) For a period of one (1) year, upon the first occasion of any offense;
- (2) For a period of two (2) years, upon the second occasion of any offense; and
- (3) Permanently, upon the third occasion of any offense.

History. Acts 1993, No. 272, § 1; 1997, No. 1058, § 27.

Cross References. Public assistance generally, § 20-76-101 et seq.

A.C.R.C. Notes. This section was formerly codified as § 5-56-104.

5-55-205. Abuse of Special Supplemental Food Program for Women, Infants and Children.

(a)(1) A federal Special Supplemental Food Program for Women, Infants and Children participant who intentionally makes a false or misleading statement or intentionally conceals or withholds a fact to obtain a benefit, sells supplemental food or a voucher to, or exchanges supplemental food or a voucher with another individual or entity, receives from a food vendor cash or credit toward the purchase of an unauthorized item or other item of value in lieu of an authorized food, or physically abuses clinic or vendor staff may be disqualified from participation in the federal Special Supplemental Food Program for Women, Infants and Children for a specified period of time.

(2) The Division of Health of the Department of Health and Human Services shall establish sanctions for participant abuse.

(b)(1) A vendor who provides cash, an unauthorized food, or other item in lieu of an authorized supplemental food or who charges the state or local agency more for a supplemental food than another

customer is charged for the same food item is disqualified from participation in the federal Special Supplemental Food Program for Women, Infants and Children for a specified period of time.

(2) The division shall establish sanctions for vendor abuse.

History. Acts 1993, No. 489, § 4.

A.C.R.C. Notes. This section was formerly codified as § 5-56-105.

SUBCHAPTER 3 — CLAIMS FOR BENEFITS

SECTION.

5-55-301. Penalty — Notice — Prosecution.

A.C.R.C. Notes. Due to the addition of Subchapter 3 by Acts 1995, No. 862, and the transfer of former § 5-56-101 et seq. to be Subchapter 2, the preexisting provisions of this chapter have been designated as Subchapter 1.

Effective Dates. Acts 1995, No. 862, § 12: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1995 is

essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1995 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

5-55-301. Penalty — Notice — Prosecution.

(a) Any person or entity who willfully and knowingly makes any material false statement or representation for the purpose of obtaining any benefit or payment, or for the purpose of defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment, or who aids and abets for either of these purposes, is guilty of a Class D felony.

(b) A copy of subsection (a) of this section shall be placed on all forms prescribed by the State Department for Social Security Administration Disability Determination for the use of a person claiming a benefit, a provider participating in the claims process, and any other party involved in the claims process.

(c) When the department finds that a false or misleading statement or representation was made willfully and knowingly for the purpose of obtaining a benefit or payment, or for the purpose of obtaining, wrongfully increasing, wrongfully decreasing, or defeating any claim for a benefit or payment, the Director of the State Department for Social Security Administration Disability Determination shall refer the mat-

ter for appropriate action to the prosecuting attorney of the district where the original claim was filed.

History. Acts 1995, No. 862, § 6.

SUBCHAPTER 4 — PENALTIES FOR PLACING NAME OF ANOTHER PERSON ON PROPERTY ASSESSMENT TO AVOID FEES

SECTION.

5-55-401. Penalties.

5-55-401. Penalties.

(a) It is unlawful for any person to knowingly place the assessment of property under the name of another person in order to avoid the payment of a fee associated with the property.

(b) A violation of this section is a Class B misdemeanor.

History. Acts 2001, No. 1369, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

CHAPTER 56 ILLEGAL FOOD COUPONS

SECTION.

5-56-101 — 5-56-105. [Transferred.]

5-56-101 — 5-56-105. [Transferred.]

A.C.R.C. Notes. This chapter has been
transferred to § 5-55-201 et seq.

CHAPTERS 57-59

[Reserved]

SUBTITLE 6. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, OR WELFARE

CHAPTER 60 GENERAL PROVISIONS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. INTENT TO DEFRAUD A DRUG OR ALCOHOL SCREENING TEST.

Publisher's Notes. Because of the enactment of Subchapter 2 of this chapter by Acts 2003, No. 750, the preexisting provisions of this chapter have been designated as Subchapter 1.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Preambles. Acts 1935, No. 64, contained a preamble which read: "Whereas, there has heretofore been conducted in the State of Arkansas various kinds of endurance contests in which human beings participated as contestants, known sometimes as walkathons or marathons, and

"Whereas, it has been determined that such walking, rocking, running, dancing, and other forms of contests are injurious to the health of the participants and detrimental to the morals and welfare of the public..."

Effective Dates. Acts 1901, No. 167, § 3: effective 60 days after passage.

Acts 1905, No. 119, § 2: effective on passage.

Acts 1931, No. 315, § 3: became law without Governor's signature, Apr. 2, 1931. Emergency clause provided: "Because of the great need for wholesome recreation on Sunday throughout the entire State an emergency is hereby declared to exist, and this Bill being for the immediate preservation of the public peace, health and comfort of the people of the State of Arkansas, this Act shall take effect and be in full force and effect from and after its passage."

Acts 1935, No. 64, § 4: approved Feb. 20, 1935. Emergency clause provided: "It having been determined that the acts and conduct prohibited by this act are detrimental to public health, peace, and safety, an emergency is declared to exist, and this act shall be in full force and effect from and after its passage."

Acts 1969, No. 34, § 6: Feb. 6, 1969. Emergency clause provided: "It is hereby

found and determined by the General Assembly that glue sniffing is a serious threat to the life and the health of our citizens; that many young people who are unfamiliar with the inherent dangers of glue sniffing experiment therewith and such experiments have resulted in death or permanent brain damage; and that it is essential to the preservation of the public health and safety of this State that reasonable standards be immediately established to prohibit the practice of glue sniffing and to establish reasonable regulations for the sale of products used in glue sniffing where the seller thereof has reason to believe that the person purchasing the same intends to use it for unlawful purposes. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 382, § 5: Mar. 2, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the misuse of hand-held laser pointers can cause serious injuries to the eye; that hand-held laser pointers can be mistaken for targeting devices on firearms; that the devices are relatively cheap and readily available to minors; and that most of the misuse of these devices has been by minors. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-60-101. Abuse of a corpse.

5-60-102 — 5-60-109. [Reserved.]

5-60-110. [Repealed.]

5-60-111. [Repealed.]

SECTION.

5-60-112. Misconduct on bus — In general.

5-60-113. [Repealed.]

5-60-114. Open shafts or wells.

SECTION.

- 5-60-115. Filling or covering abandoned water wells.
 5-60-116. Breathing, inhaling, or drinking certain intoxicating compounds.
 5-60-117 — 5-60-119. [Repealed.]
 5-60-120. Interception and recording.

SECTION.

- 5-60-121. Sale of hand-held laser pointer to minor.
 5-60-122. Possession of hand-held laser pointer by minor.
 5-60-123. Obstruction or interference with emergency medical personnel.

5-60-101. Abuse of a corpse.

(a) A person commits abuse of a corpse if, except as authorized by law, he or she knowingly:

- (1) Disinters, removes, dissects, or mutilates a corpse; or
- (2) Physically mistreats a corpse in a manner offensive to a person of reasonable sensibilities.

(b) Abuse of a corpse is a Class D felony.

History. Acts 1975, No. 280, § 2920; A.S.A. 1947, § 41-2920.

CASE NOTES**ANALYSIS**

Constitutionality.
 Applicability.
 Autopsy.

Constitutionality.

This section is not unconstitutionally vague, as it conveys fair and sufficient warning when measured by common understanding. *Dougan v. State*, 322 Ark. 384, 912 S.W.2d 400 (1995).

Applicability.

The legislature intended that this section cover defendant's placement of her baby's corpse in a dumpster, as such an

act constitutes a form of mishandling, abuse, or neglect. There was sufficient proof from which the jury could have concluded that defendant's conduct amounted to physical mistreatment of a corpse in a manner offensive to a person of reasonable sensibilities. *Dougan v. State*, 322 Ark. 384, 912 S.W.2d 400 (1995).

Autopsy.

An insurer's right under an accident policy to make an autopsy was not barred by former section concerning the removal of a dead body from the grave. *Standard Accident Ins. Co. v. Rossi*, 35 F.2d 667 (8th Cir. 1929) (decision under prior law).

5-60-102 — 5-60-109. [Reserved.]**5-60-110. [Repealed.]**

Publisher's Notes. This section, concerning relinquishing a party line for emergency calls, was repealed by Acts

2005, No. 1994, § 543. The section was derived from Acts 1955, No. 240, §§ 1-3; A.S.A. 1947, §§ 41-2974 — 41-2976.

5-60-111. [Repealed.]

Publisher's Notes. This section, concerning communicating a false alarm by means of citizen's band radio, was re-

pealed by Acts 2005, No. 1994, § 521. The section was derived from Acts 1977, No. 277, § 1; A.S.A. 1947, § 41-2921.

5-60-112. Misconduct on bus — In general.

(a) As used in this section:

(1) “Bus” means any passenger bus or coach or other motor vehicle having a seating capacity of not fewer than fifteen (15) passengers operated by a bus transportation company for the purpose of carrying passengers or cargo for hire, but not to include a bus or coach utilized exclusively to transport children to and from schools;

(2)(A) “Bus transportation company” means any person, group of persons, or corporation providing for-hire transport to passengers or cargo by a bus upon a highway of this state.

(B) “Bus transportation company” includes a bus transportation facility owned or operated by a local public body, municipality, public corporation, board, and commission, except a school district established under the laws of this state.

(C) “Bus transportation company” does not include a company utilizing a bus for transporting children to and from school;

(3) “Charter” means a group of persons who, pursuant to a common purpose and under a single contract and at a fixed charge for the vehicle in accordance with a bus transportation company’s tariff, have acquired the exclusive use of a bus to travel together as a group to a specified destination; and

(4)(A) “Passenger” means any person served by a bus transportation company.

(B) “Passenger” includes a person accompanying or meeting another person who is transported by a bus transportation company and any person shipping or receiving cargo.

(b) It is unlawful while on a bus for any person to:

(1) Threaten a breach of the peace;

(2) Be under the influence of alcohol;

(3) Be unlawfully under the influence of a controlled substance;

(4) Ingest or have in his or her possession any controlled substance unless properly prescribed by a physician or medical facility;

(5) Drink intoxicating liquor of any kind in or upon any passenger bus, except a chartered bus; or

(6) Fail to obey a reasonable request or order of a bus driver or any authorized bus transportation company representative.

(c)(1) If any person violates any provision of subsection (b) of this section, the driver of the bus or person in charge may:

(A) Stop the bus at the place where the offense is committed or at the next regular or convenient stopping place of the bus; and

(B) Require the person to leave the bus.

History. Acts 1983, No. 688, §§ 1, 2; A.S.A. 1947, §§ 41-2924, 41-2925; Acts 2005, No. 1994, § 495.

Amendments. The 2005 amendment deleted “or use any obscene, profane, or

vulgar language” at the end of (b)(1); inserted “or her” in (b)(2); substituted “violates” for “shall violate” in (c)(1); and made minor stylistic changes.

5-60-113. [Repealed.]

Publisher's Notes. This section, concerning using abusive language to a school bus driver, was repealed by Acts

2005, No. 1994, § 522. The section was derived from Acts 1977, No. 814, §§ 1, 2; A.S.A. 1947, §§ 41-2922, 41-2923.

5-60-114. Open shafts or wells.

(a) It is unlawful for any corporation, company, individual person, or association of persons to leave any shaft, well, or other opening uncovered on any unenclosed land.

(b) Any corporation, company, individual person, or association of persons who digs any shaft, well, or other opening, whether for the purpose of mining or other purpose, is required to securely enclose the opening or cover the opening and keep it covered with strong and sufficient covering.

(c) Any corporation, company, individual, person, or association of persons who violates a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100) for any such offense and is liable to anyone who may lose any stock by the opening for two (2) times the appraised value of the stock.

History. Acts 1901, No. 167, §§ 1, 2, p. 320; 1905, No. 119, § 1, p. 312; C. & M. Dig., §§ 375, 376; Pope's Dig., §§ 399, 400; A.S.A. 1947, §§ 41-2951, 41-2952; Acts 2005, No. 1994, § 52.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor" in (c).

RESEARCH REFERENCES

Ark. L. Rev. Absolute Liability in Arkansas, 8 Ark. L. Rev. 83.

CASE NOTES**ANALYSIS**

Purpose.
Applicability.
Negligence.
Possession.
Use of well.
Well dug by another.

Purpose.

The purpose of this statute was to protect animals running at large, and not to protect persons. *Kimbrough v. Johnson*, 182 Ark. 522, 32 S.W.2d 154 (1930).

Applicability.

This section applies to a well or opening on a lot in a city or town occupied as a residence. *American Bldg. & Loan Ass'n v. State*, 147 Ark. 80, 226 S.W. 1056 (1921).

While the statute applies to other openings than shafts or wells, it does not apply to the construction of sewers temporarily left open. *Campbell & Hengst v. Douthit*, 170 Ark. 358, 279 S.W. 1018 (1925).

Negligence.

Liability may be imposed without reference to the question of negligence, it being sufficient to show that an artificial well was dug on the land and that it was left exposed in a condition which might endanger livestock. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

Possession.

Liability does not depend upon the owner's actual possession of the land, his constructive possession by reason of own-

ership being sufficient. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

Use of Well.

It is unlawful to keep a well uncovered though it was not dug for mining purposes. *American Bldg. & Loan Ass'n v. State*, 147 Ark. 80, 226 S.W. 1056 (1921).

The fact that the well was being used as a source of water supply does not relieve the owner from liability if he permitted it to remain uncovered on unenclosed land. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

Well Dug by Another.

An owner of land may be convicted under this section although he did not dig the well. *American Bldg. & Loan Ass'n v. State*, 147 Ark. 80, 226 S.W. 1056 (1921).

Liability is not dependent on the fact that the person or corporation against whom liability is sought to be imposed dug the well but may be incurred by permitting a well dug by another to remain uncovered. *Frauenthal v. Morton*, 149 Ark. 148, 231 S.W. 884 (1921).

5-60-115. Filling or covering abandoned water wells.

(a) When the owner of land abandons or ceases to use any dug water well located on the land, he or she shall either fill the well or place a sturdy cover over the well to prevent animals and persons from falling into the well.

(b) Any person who willfully fails or refuses to either fill or cover the well, as provided in subsection (a) of this section, is guilty of a violation and upon conviction is subject to a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00).

History. Acts 1967, No. 193, §§ 1, 2; A.S.A. 1947, §§ 41-3755, 41-3756; Acts 2005, No. 1994, § 52.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor" in (b).

RESEARCH REFERENCES

Ark. L. Rev. Looney, Modification of Arkansas Water Law: Issues and Alternatives, 38 Ark. L. Rev. 221.

5-60-116. Breathing, inhaling, or drinking certain intoxicating compounds.

(a)(1) No person shall breathe, inhale, or drink any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichlorathane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other similar substance or any gasoline or similar substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis, irrational behavior, or in any manner changing, distorting, or disturbing the auditory, visual, or mental processes.

(2) For the purposes of this section, any condition induced as provided in subdivision (a)(1) of this section is deemed to be an intoxicated condition.

(b)(1) This section does not apply to any person who commits any act described in this section pursuant to the direction or prescription of a licensed physician or dentist authorized to direct or prescribe the act.

(2) Nothing contained in this section applies to the inhalation of anesthesia for a medical or dental purpose.

(c) Any person who violates any provision of this section is guilty of a Class B misdemeanor.

History. Acts 1969, No. 34, §§ 1-3; A.S.A. 1947, §§ 41-2963 — 41-2965; Acts 2005, No. 1994, § 381.

Amendments. The 2005 amendment substituted "Class B misdemeanor" for "misdemeanor and upon conviction shall

be subject to a fine of not less than one hundred dollars (\$100) nor more than two hundred dollars (\$200) or imprisonment for not less than thirty (30) days nor more than six (6) months, or both fine and imprisonment" in (c).

5-60-117 — 5-60-119. [Repealed.]

Publisher's Notes. These sections, concerning endurance contests, X-ray shoe fitting equipment, and motion pictures shown on Sunday, were repealed by Acts 2005, No. 1994, § 544. The sections were derived from the following sources:

5-60-117. Acts 1935, No. 64, §§ 1, 2; Pope's Dig., §§ 3359, 3360; A.S.A. 1947, §§ 41-3751, 41-3752.

5-60-118. Acts 1959, No. 133, §§ 1, 2; A.S.A. 1947, §§ 41-3753, 41-3754.

5-60-119. Acts 1931, No. 315, § 1; Pope's Dig., § 4908; A.S.A. 1947, § 41-3851.

Section 5-60-119 was also repealed by Acts 2005, No. 448, § 1.

5-60-120. Interception and recording.

(a) It is unlawful for a person to intercept a wire, landline, oral, telephonic communication, or wireless communication, and to record or possess a recording of the communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.

(b) Any violation of this section is a Class A misdemeanor.

(c)(1) It is not unlawful for the act to be committed by a person acting under the color of law.

(2) It is an exception to the application of subsection (a) of this section that an officer, employee, or agent of a public telephone utility or company that is licensed by a federal or state agency to provide wire or wireless telecommunication service to the public provides information, facilities, or technical assistance to a person acting under the color of law to intercept a wire, wireless, oral, or telephonic communication.

(3) It is not unlawful under this section for an operator of a switchboard, or an officer, employee, or agent of any public telephone utility or telecommunications provider whose facilities are used in the transmission of a wire communication to intercept, disclose, or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the telecommunications provider or public telephone utility of the communication.

(d) The provisions of this section do not apply to a:

(1) Telecommunication service offered by a telecommunications provider or public telephone utility; or

(2) Federal Communications Commission licensed amateur radio operator.

(e) Nothing in this section shall be interpreted to prohibit or restrict a Federal Communications Commission licensed amateur radio operator or anyone operating a police scanner from intercepting a communication for pleasure.

(f) Consistent with the provisions of 18 U.S.C. § 2703, as it existed on January 1, 2003, the issuance of a court order for disclosure of a customer communication or record to a governmental entity requiring the information as part of an ongoing criminal investigation is not prohibited by the laws of this state.

(g) Consistent with the provisions of 18 U.S.C. §§ 3122 — 3127, as they existed on January 1, 2003, the issuance of a court order authorizing or approving the installation and use of a pen register or a trap-and-trace device as part of an ongoing criminal investigation is not prohibited by the laws of this state.

History. Acts 1993, No. 1006, §§ 1-5; 2001, No. 1190, § 1; 2001, No. 1773, § 1; 2001, No. 1823, § 1; 2003, No. 1087, § 7.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out as amended by Acts 2001, No. 1823, § 1. Subsection (a) of this section was also amended by Acts 2001, No. 1190, § 1, and Acts 2001, No. 1773, § 1. Acts 2001, No. 1190, § 1, amended subsection (a) to read as follows:

“(a) It shall be unlawful for a person to:

“(1) Intercept, unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception and recording:

“(A) A wire communication; or

“(B) An oral communication; or

“(C) A telephonic communication, including a communication that utilizes the electromagnetic spectrum frequencies generally used by cordless telephone technology and generally used by cellular telephone technology; or

“(2) Record or possess a recording of such communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.”

Acts 2001, No. 1773, § 1, amended subsection (a) to read as follows:

“(a) It shall be unlawful for a person to intercept a wire, oral, or telephonic communication, defined as communications that utilize the electromagnetic spectrum frequencies of forty-six to forty-nine megahertz (46-49 mghz.) generally used by cordless telephone technology and eight hundred forty to eight hundred eighty megahertz (840-880 mghz.) generally used by cellular telephone technology or that utilize the wire, cable, or landline telephone facilities or telecommunications network, and to record or possess a recording of such communication unless such a person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception and recording.”

Amendments. The 2001 amendment rewrote (a); in (c)(2), inserted “or company that ... service to the public” and “wireless” following “wire”; in (c)(3), inserted “telecommunications provider” and made gender neutral changes; in (d), inserted “a telecommunications provider” and “or an amateur radio operator licensed by the Federal Communications Commission” and substituted “utility” for “utilities”; and added (e).

The 2003 amendment added (f) and (g).

Cross References. Wireless service theft prevention, § 5-36-301 et seq.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 UALR L.J. 361.

CASE NOTES

ANALYSIS

Evidence.

—Admissibility of unlawful recording.

Evidence.

The defendant's own testimony was sufficient to establish a violation of this section where (1) during a hearing on a charge of violating an order of protection, the prosecuting attorney asked whether the defendant had any devices on his ex-wife's telephone and the defendant responded that he "did at one time," and (2) at a probation revocation hearing, the

defendant admitted that he placed an electronic recording device on his ex-wife's telephone line and intercepted some of her private conversations. *Lewis v. State*, 62 Ark. App. 150, 970 S.W.2d 299 (1998).

—**Admissibility of unlawful recording.**

This section does not proscribe the admissibility of an unlawful recording of an electronic communication by a private citizen. *Elliott v. State*, 335 Ark. 387, 984 S.W.2d 362 (1998).

Cited: *Lewis v. State*, 336 Ark. 469, 986 S.W.2d 95 (1999).

5-60-121. Sale of hand-held laser pointer to minor.

(a) It is unlawful to sell a hand-held laser pointer to a person under eighteen (18) years of age.

(b) Any person who violates this section is guilty of a violation punishable by a fine of one hundred dollars (\$100).

History. Acts 1999, No. 382, § 1.

5-60-122. Possession of hand-held laser pointer by minor.

(a) It is unlawful for a person under eighteen (18) years of age to possess a hand-held laser pointer without the supervision of a parent, guardian, or teacher.

(b) The hand-held laser pointer shall be seized by a law enforcement officer as contraband.

History. Acts 1999, No. 1408, § 1.

Cross References. Seizure by school

personnel of hand-held laser pointers, § 6-18-512.

5-60-123. Obstruction or interference with emergency medical personnel.

(a) It is unlawful for a person to obstruct or interfere with an emergency medical technician, rescue technician, or any other emergency medical care provider, whether governmental, private, or volunteer emergency medical personnel, in the performance of his or her rescue mission.

(b)(1) Obstruction or interference with emergency medical personnel by using or threatening to use physical force is a Class A misdemeanor.

(2) Obstruction or interference with emergency medical personnel other than by physical force or threatening physical force is a Class C misdemeanor.

History. Acts 2005, No. 1683, § 1.

SUBCHAPTER 2 — INTENT TO DEFRAUD A DRUG OR ALCOHOL SCREENING TEST

SECTION.

5-60-201. Unlawful activities.

5-60-202. Construction.

5-60-201. Unlawful activities.

(a)(1)(A) It is unlawful for a person to:

(i) Sell, give away, distribute, or market urine in this state or transport urine into this state with the intent of using the urine to defraud or cause deceitful results in a drug or alcohol screening test;

(ii) Attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a urine sample or by advertising urine sample substitution or urine spiking devices or measures;

(iii) Adulterate a urine or other bodily fluid sample with the intent to defraud or cause deceitful results in a drug or alcohol screening test;

(iv) Possess adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding or causing deceitful results in a drug or alcohol screening test; or

(v) Sell or market an adulterant with the intent by the seller or marketer that the product be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding or causing deceitful results in a drug or alcohol screening test.

(B) “Adulterant” means a substance that is not expected to be in human urine or a substance expected to be present in human urine but that is at a concentration so high that it is not consistent with human urine, including, but not limited to:

(i) Bleach;

(ii) Chromium;

(iii) Creatinine;

(iv) Detergent;

(v) Glutaraldehyde;

(vi) Glutaraldehyde/squalene;

(vii) Hydrochloric acid;

(viii) Hydroiodic acid;

(ix) Iodine;

(x) Nitrite;

(xi) Peroxidase;

(xii) Potassium dichromate;

(xiii) Potassium nitrite;

(xiv) Pyridinium chlorochromate; and

(xv) Sodium nitrite.

(2) Any person who violates subdivision (a)(1)(A) of this section is guilty of a Class B misdemeanor.

(b) Intent to defraud or cause deceitful results in a drug or alcohol screening test is presumed if:

(1) A heating element or any other device used to thwart a drug screening test accompanies the sale, giving, distribution, or marketing of urine; or

(2) Instructions that provide a method for thwarting a drug screening test accompany the sale, giving, distribution, or marketing of urine.

History. Acts 2003, No. 750, § 1.

5-60-202. Construction.

Nothing in this subchapter or §§ 20-7-309 and 20-7-310 shall be construed to encourage, conflict, or otherwise interfere with the preemption of state and local laws under any federal laws or United States Department of Transportation regulations related to drug testing procedures and confidentiality.

History. Acts 2003, No. 750, § 2.

CHAPTER 61

ABORTION

SUBCHAPTER

1. GENERAL PROVISIONS.

2. PARTIAL-BIRTH ABORTION BAN ACT OF 1997.

A.C.R.C. Notes. Because of the enactment of Subchapter 2 by Acts 1997, No. 984, the preexisting provisions of this chapter have been designated as Subchapter 1.

Cross References. Abortion, Ark. Const. Amend. 68.

Concealing birth, § 5-26-203.

Registration and inspection of abortion clinics, § 20-9-302.

Abortion, §§ 20-16-601 et seq., 20-16-701 et seq., 20-16-801 et seq.

RESEARCH REFERENCES

Am. Jur. 1 Am. Jur. 2d, Abortion, § 1 et seq.

C.J.S. 1 C.J.S., Abortion & B.C., § 4 et seq.

UALR L.J. Legislative Survey, Health Law, 8 UALR L.J. 583.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-61-101. Abortion only by licensed medical practitioner.

SECTION.

5-61-102. Unlawful abortion.

A.C.R.C. Notes. Because of the enactment of Subchapter 2 by Acts 1997, No. 984, the preexisting provisions of this chapter have been designated as Subchapter 1.

5-61-101. Abortion only by licensed medical practitioner.

(a) It is unlawful for any person to induce another person to have an abortion or to willfully terminate the pregnancy of a woman known to be pregnant with the intent to cause fetal death unless the person is licensed to practice medicine in the State of Arkansas.

(b) Violation of subsection (a) of this section is a Class D felony.

(c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

History. Acts 1983, No. 715, §§ 1, 2; A.S.A. 1947, § 41-2561; Acts 1999, No. 1273, § 4.

5-61-102. Unlawful abortion.

(a) It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.

(b) Any person violating a provision of this section is guilty of a Class D felony.

(c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

History. Acts 1969, No. 61, § 1; A.S.A. 1947, § 41-2553; Acts 1999, No. 1273, § 5; 2005, No. 1994, § 428.

Publisher's Notes. This section was held unconstitutional, as applied to physicians, by *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980). See case notes.

Amendments. The 2005 amendment, in (b), substituted "guilty of a Class D felony" for "fined in any sum not to exceed one thousand dollars (\$1,000) and imprisoned in the penitentiary not less than one (1) nor more than five (5) years."

CASE NOTES

ANALYSIS

- Constitutionality.
- Accomplice.
- Defense.
- Elements.
- Indictment.
- Presence of accused.
- Proof.
- Standing.

Constitutionality.

The effect of the U. S. Supreme Court holdings on this section was to strike down the prohibition on abortion as against physicians during the period preceding approximately the end of the first trimester. *May v. State*, 254 Ark. 194, 492 S.W.2d 888, cert. denied, 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315 (1973).

This section could not be constitutionally applied to physicians since the statute does not provide, and is not capable of being construed to provide, the physicians with notice of the conduct which the State has the authority to declare criminal; however, the statute could be constitutionally applied to laymen. *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

Accomplice.

The victim of an abortion was not considered an accomplice to the crime under this section. *Heath v. State*, 249 Ark. 217, 459 S.W.2d 420 (1970), cert. denied, 404 U.S. 910, 92 S. Ct. 236, 30 L. Ed. 2d 183 (1971) (decision under prior law).

Defense.

Where the defendant prescribed or administered medicine to produce an abortion he is guilty, and it is no defense that the medicine was not taken or that it failed to produce an abortion. *Burris v. State*, 73 Ark. 453, 84 S.W. 723 (1904); *Clayton v. State*, 186 Ark. 713, 55 S.W.2d 88 (1932) (preceding decisions under prior law).

Elements.

In determination of question of an abortion the court must decide (1) Has abortion taken place? (2) Was it induced by an intentional act? (3) If the act was intentional, was the act justifiable or criminal? (4) Did the induced abortion injure health or destroy life? *McClure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948) (decision under prior law).

Indictment.

Indictment was defective to charge a felony under former similar statute in not alleging that the act was done "before the period of quickening," but it is good under the common law for a misdemeanor punishable by fine not exceeding one hundred dollars and imprisonment not exceeding three months. *Reed v. State*, 45 Ark. 333 (1885) (decision under prior law).

An indictment for administering drugs

to produce abortion need not name the particular drug used. *Reed v. State*, 45 Ark. 333 (1885) (decision under prior law).

Indictment held not defective in failing to allege that the defendant administered the medicine with the intent to cause the abortion before the period of quickening. *Davis v. State*, 96 Ark. 7, 130 S.W. 547 (1910) (decision under prior law).

Presence of Accused.

One who sends medicine to a woman with child with intent to produce an abortion is guilty under this statute. *Burris v. State*, 73 Ark. 453, 84 S.W. 723 (1904) (decision under prior law).

Where the defendant sent medicine to bring about an abortion and directed a pregnant woman in person or by letter how to take it, he was guilty although he was not present at the time the medicine was delivered to or taken by her. *Clayton v. State*, 186 Ark. 713, 55 S.W.2d 88 (1932).

Proof.

Under an indictment for administering and prescribing medicine to produce an abortion, proof of either administering or prescribing is sufficient. *Clayton v. State*, 186 Ark. 713, 55 S.W.2d 88 (1932) (decision under prior law).

Standing.

A layman had no standing to personally attack the constitutionality of this section, because, as applied to him, it simply prohibited a layman from performing or inducing an abortion. *May v. State*, 254 Ark. 194, 492 S.W.2d 888, cert. denied, 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315 (1973).

Where plaintiff physicians sought to perform abortions on demand during the first trimester of pregnancy without regard to the criteria for "legal abortions," the risk of criminal prosecution and disciplinary action was sufficient to give the plaintiffs standing to challenge the constitutionality of the state's criminal abortion statutes. *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980).

SUBCHAPTER 2 — PARTIAL-BIRTH ABORTION BAN ACT OF 1997

SECTION.

5-61-201. Title.

5-61-202. Definitions.

5-61-203. Partial-birth abortions prohibited.

5-61-204. Professional sanctions.

CASE NOTES

Constitutionality.

The Partial-Birth Abortion Ban Act of 1997 is unconstitutional as it is too broad and imposes an undue burden on women seeking abortions. The act makes it a crime to perform “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before taking the life of the fetus and completing the delivery,” but the term “partial-birth

abortion” is commonly understood to refer to a particular procedure also known as intact dilation and extraction, and the accepted description of the procedure is much more specific and much narrower than the definition of “partial-birth abortion” given in the act. *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794 (8th Cir. 1999).

5-61-201. Title.

This subchapter may be cited as the “Partial-Birth Abortion Ban Act of 1997”.

History. Acts 1997, No. 984, § 1.

5-61-202. Definitions.

As used in this subchapter, “partial-birth abortion” means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before taking the life of the fetus and completing the delivery or as defined by the United States Supreme Court.

History. Acts 1997, No. 984, § 2.

5-61-203. Partial-birth abortions prohibited.

(a) Any person who knowingly performs a partial-birth abortion and thereby takes the life of a human fetus is guilty of a Class D felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section for conspiracy, solicitation, attempt, or complicity to violate this section.

(c) It is an affirmative defense to a prosecution under this section, which must be proved by a preponderance of the evidence, that the partial-birth abortion was performed by a physician who reasonably believed:

(1) The partial-birth abortion was necessary to save the life of the woman upon whom it was performed; and

(2) No other form of abortion would suffice for that purpose.

(d)(1) Prior to charging a person under this section, a prosecutor shall refer the investigation to the State Medical Board, which shall determine whether the procedure at issue in the investigation is a partial-birth abortion as defined by this subchapter.

(2) If the board determines that the procedure being investigated is not a partial-birth abortion as defined by this subchapter, the prosecutor shall not proceed with the case.

(e) This subchapter is operative and shall be enforced to the extent permitted by the United States Constitution and laws.

History. Acts 1997, No. 984, § 3.

5-61-204. Professional sanctions.

(a) Any person who knowingly performs a partial-birth abortion is subject to disciplinary action by the State Medical Board.

(b) Disciplinary action taken by the board against a physician who violates this subchapter shall include, as determined by the board:

(1) A fine not greater than ten thousand dollars (\$10,000);

(2) Suspension of the physician's license for a period not greater than one (1) year; or

(3) Revocation of the physician's license.

History. Acts 1997, No. 984, § 4.

CHAPTER 62

ANIMALS

SUBCHAPTER.

1. GENERAL PROVISIONS.

2. FARM ANIMAL AND RESEARCH FACILITIES.

Cross References. Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Penalty for selling, etc., or killing of strays before expiration of time limit, § 2-38-118.

RESEARCH REFERENCES

Am. Jur. 4 Am. Jur. 2d, Animals, § 28 et seq.

C.J.S. 3B C.J.S., Animals, § 194 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-62-101. Cruelty to animals.

5-62-102 — 5-62-109. [Reserved.]

5-62-110. Definitions — Construction.

5-62-111. Prevention of cruelty.

5-62-112. Search warrant.

5-62-113. Authority to make arrests.

5-62-114. Authority to take charge of animals and vehicles of arrested person.

5-62-115. Injunction against society.

5-62-116. Diseased animals — Sale — Destruction.

SECTION.

5-62-117. Decompression chambers.

5-62-118. Impounded animals — Food and water.

5-62-119. Cruelty in transportation.

5-62-120. Unlawful dog fighting.

5-62-121. Transfer of certain chicks, ducklings, or rabbits.

5-62-122. Permitting livestock to run at large.

5-62-123. Larceny of animals including carcasses and flesh.

5-62-124. Unlawful bear exploitation.

Publisher's Notes. For Comments regarding the Criminal Code, see Commentaries Volume B.

Effective Dates. Acts 1879, No. 47, § 16: effective on passage.

Acts 1983, No. 285, § 3: Feb. 25, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that each year many thousands of dogs, cats and other animals are abandoned by their owners or persons having custody of them and that such abandoned animals not only create serious health hazards to individuals and other animals but they also are subjected to needless suffering; that the present law is not clear regarding the criminal responsibility of a person who abandons an animal; that this Act is necessary to correct this situation and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full

force and effect from and after its passage and approval."

Acts 2001, No. 1826, § 2: Apr. 18, 2001. Emergency clause provided: "It is found and determined by the General Assembly that each year there is an increasing number of dogs, cats and other animals subjected to cruel treatment and needless suffering, and the present law concerning cruelty to animals needs more specificity with regard to those acts against animals which subject persons to criminal responsibility. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

5-62-101. Cruelty to animals.

(a) A person commits the offense of cruelty to animals if, except as authorized by law, he or she knowingly:

- (1) Abandons any animal;
- (2) Subjects any animal to cruel mistreatment;
- (3) Subjects any animal in his or her custody to cruel neglect; or
- (4) Kills or injures any animal belonging to another without legal privilege or consent of the owner.

(b) Cruelty to animals is a Class A misdemeanor.

(c)(1) In addition to any other penalty provided by law, the court may order any person found guilty of cruelty to animals to receive a psychiatric or psychological evaluation, and if determined appropriate, psychiatric or psychological counseling or treatment.

(2) The cost of any evaluation, counseling, or treatment may be ordered paid by the defendant up to the jurisdictional limit of the court.

(d) If a person pleads guilty or nolo contendere to or is found guilty of cruelty to animals, the court may assign custody of the abused animal to a society which is incorporated for the prevention of cruelty to animals.

History. Acts 1975, No. 280, § 2918; 1983, No. 285, § 1; A.S.A. 1947, § 41-2918; Acts 2001, No. 1826, § 1.

Amendments. The 2001 amendment made gender neutral changes throughout (a); and added (c) and (d).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Acts constituting offense.
Evidence.
Indictment or information.
Ordinances.
Penalty.
Proof.

Acts Constituting Offense.

Exposing poisonous substances was administering it, if the animal in fact got it. *Hankins v. State*, 118 Ark. 419, 176 S.W. 691 (1915) (decision under prior law).

Evidence.

The evidence was sufficient to show defendant must have been aware that she allowed the animals to reach a deplorable condition. *Norton v. State*, 307 Ark. 336, 820 S.W.2d 272 (1991).

Indictment or Information.

An indictment did not have to allege that the animal was killed in an enclosure having an insufficient fence; if killed while trespassing in the defendant's enclosure,

having a lawful fence, he could prove it in defense. *Dean v. State*, 37 Ark. 57 (1881) (decision under prior law).

Ordinances.

As this section subjects an offender to the possibility of both a fine and imprisonment, city ordinance providing for a fine only is invalid, and conviction thereunder must be reversed. *Ford v. City of Hot Springs*, 294 Ark. 435, 743 S.W.2d 394 (1988).

Penalty.

The offenses created by former section which prohibited cruelty to animals were punishable by fine or imprisonment, or both. *State v. Greenlees*, 41 Ark. 353 (1883) (decision under prior law).

Proof.

As offense is criminal offense, the state must establish guilt beyond a reasonable doubt. *Ford v. City of Hot Springs*, 294 Ark. 435, 743 S.W.2d 394 (1988).

Cited: *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

5-62-102 — 5-62-109. [Reserved.]**5-62-110. Definitions — Construction.**

(a) As used in this section and §§ 5-62-111 — 5-62-119:

(1) "Animal" or "dumb animal" includes every living creature;

(2) "Cruelty", "torture", or "torment" include every act, omission, or neglect in which unjustifiable physical pain, suffering, or death is caused or permitted; and

(3) "Owner" and "person" include a corporation as well as an individual.

(b) Nothing in this section and §§ 5-62-111 — 5-62-119 shall be construed as prohibiting the shooting of a bird or other game for the purpose of human food.

History. Acts 1879, No. 47, § 15, p. 54;
C. & M. Dig., § 2625; Pope's Dig., § 3312;
A.S.A. 1947, § 41-2962.

5-62-111. Prevention of cruelty.

(a) Any officer, agent, or member of a society which is incorporated for the prevention of cruelty to animals may lawfully interfere to prevent the perpetration of any act of cruelty upon any animal in his or her presence.

(b) Any person who interferes with or obstructs any officer, agent, or member of a society which is incorporated for the prevention of cruelty to animals in the discharge of his or her duty is guilty of a misdemeanor.

History. Acts 1879, No. 47, § 10, p. 54;
C. & M. Dig., § 2619; Pope's Dig., § 3306;
A.S.A. 1947, § 41-2957.

CASE NOTES

Cited: Elliott v. Hurst, 307 Ark. 134,
817 S.W.2d 877 (1991).

5-62-112. Search warrant.

Upon complaint under oath or affirmation to any magistrate authorized to issue warrants in criminal cases that the complainant has any just and reasonable cause to suspect that any provision of law relating to or in anywise affecting animals is being, or is about to be, violated in any particular building or place, the magistrate shall immediately issue and deliver a warrant to any person authorized by law to make arrests for such offenses authorizing him or her to enter and search the building or place and to arrest any person found present in the building or place violating any of the laws and to bring that person before the nearest magistrate of competent jurisdiction, to be dealt with according to law.

History. Acts 1879, No. 47, § 14, p. 54;
C. & M. Dig., § 2624; Pope's Dig., § 3311;
A.S.A. 1947, § 41-2961.

CASE NOTES

Search.

There was no evidence that any of the Humane Society officers that conducted a search of defendant's property had received an appointment from the president of the North Central Arkansas Humane Society, or any other such groups, to make

arrests; thus there was no showing that they could have obtained a search warrant as "officers." Norton v. State, 307 Ark. 336, 820 S.W.2d 272 (1991).

Cited: Holt v. City of Maumelle, 647 F. Supp. 1529 (E.D. Ark. 1986).

5-62-113. Authority to make arrests.

Upon being appointed by the president of any society which is incorporated for the prevention of cruelty to animals in any county of this state, an agent of the society within the county may make arrests and bring before any court or magistrate having jurisdiction any

offender found violating the provisions of this section, §§ 5-62-110 — 5-62-112, and §§ 5-62-114 — 5-62-119.

History. Acts 1879, No. 47, § 9, p. 54;
C. & M. Dig., § 2618; Pope's Dig., § 3305;
A.S.A. 1947, § 41-2956.

CASE NOTES

Search.

There was no evidence that any of the Humane Society officers that conducted a search of defendant's property had received an appointment from the president of the North Central Arkansas Humane

Society, or any other such groups, to make arrests; thus there was no showing that they could have obtained a search warrant as "officers." *Norton v. State*, 307 Ark. 336, 820 S.W.2d 272 (1991).

5-62-114. Authority to take charge of animals and vehicles of arrested person.

(a) When any person arrested is in charge at the time of the arrest of any vehicle drawn by or containing any animal, any agent of a society for the prevention of cruelty to animals may take charge of the animal, the vehicle, and the vehicle's contents and deposit them in a safe place of custody or deliver them into the possession of the police or sheriff of the county or place where the arrest was made.

(b) The police or sheriff of the county shall then assume the custody of the animal, the vehicle, and the vehicle's contents.

History. Acts 1879, No. 47, § 12, p. 54;
C. & M. Dig., § 2621; Pope's Dig., § 3308;
A.S.A. 1947, § 41-2959.

5-62-115. Injunction against society.

No injunction shall be granted against a society for the prevention of cruelty to animals or any of its officers or agents except upon motion after due notice and a hearing on the motion.

History. Acts 1879, No. 47, § 13, p. 54;
C. & M. Dig., § 2623; Pope's Dig., § 3310;
A.S.A. 1947, § 41-2960.

5-62-116. Diseased animals — Sale — Destruction.

(a) Any person who sells or offers for sale, or uses, or exposes, or causes or procures to be sold or offered for sale, or used, or to be exposed, any horse or other animal having the disease known as "glanders" or "farcy" or any other contagious or infectious disease known to the person to be dangerous to human life, or that is diseased past recovery, is guilty of a misdemeanor.

(b)(1) Upon discovery or knowledge of the animal's condition, any animal having glanders or farcy shall immediately be deprived of life by the owner or person having charge of the animal.

(2) Any owner or person having charge of the animal omitting or refusing to comply with a provision of this section is guilty of a misdemeanor.

(c) Any agent or officer of a society for the prevention of cruelty to animals may lawfully destroy or cause to be destroyed any animal found abandoned or otherwise and not properly cared for, appearing, in the judgment of two (2) reputable citizens called by him or her to view the animal in his or her presence, to be glandered, injured, or diseased past recovery for any useful purpose.

History. Acts 1879, No. 47, §§ 7, 8, 11, Pope's Dig., §§ 3303, 3304, 3307; A.S.A. p. 54; C. & M. Dig., §§ 2616, 2617, 2620; 1947, §§ 41-2958, 41-3757, 41-3758.

RESEARCH REFERENCES

Ark. L. Notes. Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, 1990 Ark. L. Notes 75.

CASE NOTES

Cited: Compagionette v. McArmick, 91 Ark. 69, 120 S.W. 400 (1909).

5-62-117. Decompression chambers.

(a) It is unlawful to use a decompression chamber for the destruction of an animal.

(b) Use of a decompression chamber for the destruction of an animal is a Class C misdemeanor.

History. Acts 1979, No. 112, §§ 1, 2; A.S.A. 1947, §§ 41-2958.1, 41-2958.2.

5-62-118. Impounded animals — Food and water.

(a) Any person who impounds or causes to be impounded in any pound or other place any creature shall supply to it during the confinement a sufficient quantity of good wholesome food and water, and in default of this requirement upon conviction is adjudged guilty of a misdemeanor.

(b)(1) When any creature is at any time impounded as provided in subsection (a) of this section and continues to be without necessary food and water for more than twelve (12) successive hours, it is lawful from time to time and as often as it is necessary for any person to enter into and upon any pound or other place in which the creature is so confined and to supply it with necessary food and water so long as the creature remains so confined.

(2)(A) A person is not liable to any action for the entry and the reasonable cost of the food and water may be collected by him or her from the owner of the creature.

(A) The creature is not exempt from levy and sale upon execution issued upon a judgment for the reasonable cost of the food and water.

History. Acts 1879, No. 47, §§ 3, 4, p. 54; C. & M. Dig., §§ 2612, 2613; Pope's Dig., §§ 3299, 3300; A.S.A. 1947, §§ 41-2953, 41-2954.

5-62-119. Cruelty in transportation.

(a)(1) If any person carries or causes to be carried in or upon any vehicle, boat, or otherwise any creature in a cruel or inhuman manner, he or she is guilty of a misdemeanor.

(2) When the person is taken into custody by any officer, the officer may take charge of the vehicle, boat, etc., and its contents, and deposit them in a safe place of custody.

(b) Any necessary expenses that may be incurred for taking charge of and keeping and sustaining the vehicle, boat, etc. is a lien on the vehicle, boat, etc. to be paid before the vehicle, boat, etc. can lawfully be recovered, or the expenses, or any part of the expenses, remaining unpaid may be recovered by the person incurring the expenses of the owner of the creature in any action therefor.

History. Acts 1879, No. 47, § 5, p. 54; C. & M. Dig., § 2614; Pope's Dig., § 3301; A.S.A. 1947, § 41-2955.

5-62-120. Unlawful dog fighting.

(a)(1) A person commits the offense of unlawful dog fighting in the first degree if he or she knowingly:

(A) Promotes, engages in, or is employed at dog fighting;

(B) Receives money for the admission of another person to a place kept for dog fighting; or

(C) Sells, purchases, possesses, or trains a dog for dog fighting.

(2) Unlawful dog fighting in the first degree is a Class D felony.

(b)(1) A person commits the offense of unlawful dog fighting in the second degree if he or she knowingly:

(A) Purchases a ticket of admission to or is present at a dog fight; or

(B) Witnesses a dog fight if it is presented as a public spectacle.

(2) Unlawful dog fighting in the second degree is a Class A misdemeanor.

(c) Upon the arrest of any person for violating a provision of this section, the arresting law enforcement officer or animal control officer may seize and take custody of all dogs in the possession of the arrested person.

(d)(1) Upon the conviction of any person for violating a provision of this section, any court of competent jurisdiction may order the forfeiture by the convicted person of all dogs the use of which was the basis of the conviction.

(2) Any dog ordered forfeited under a provision of this subsection shall be placed in the custody of a society which is incorporated for the prevention of cruelty to animals or an animal control agency.

(e) In addition to the fines, penalties, and forfeitures imposed under the provisions of this section, the court may require the defendant to make restitution to the state, any of its political subdivisions, or a society which is incorporated for the prevention of cruelty to animals for housing, feeding, or providing medical treatment to a dog used for unlawful dog fighting.

History. Acts 1981, No. 862, § 1; A.S.A. 1947, § 41-2918.1; Acts 1987, No. 26, § 1; 1989, No. 528, § 1.

CASE NOTES

Evidence.

Where, in prosecution for witnessing a dog fight presented as a public spectacle, a copy of the rules for dog fighting was lawfully seized by the officers as being incidental to the arrests, because it was within the immediate control at least of one witness, and as being evidence of the offense, and the rules were relevant to the action, explaining the purpose of the pit and details shown by the videotape, the copy of the rules was admissible even though the state did not show that the defendants were aware of its existence. *Ash v. State*, 290 Ark. 278, 718 S.W.2d 930 (1986).

The state produced substantial evidence to show the defendant to be guilty of

having "promoted" dog fighting, even though she was not present at the dog fight, where the defendant knew that a structure had been built in the back yard for the specific purpose of housing pit bull dogs, with accommodations to contain dogs other than their own, she was familiar with the pit and knew it could be used for dog fighting, she knew that her husband had fought dogs, she realized that numbers of people came to the house from time to time and brought pit bull terriers with them, and she and her children had helped to take care of the dogs, washing them and feeding them. *Ash v. State*, 290 Ark. 278, 718 S.W.2d 930 (1986).

5-62-121. Transfer of certain chicks, ducklings, or rabbits.

(a) It is unlawful for any person, firm, or corporation to sell or offer for sale, barter, or give away living baby chicks, rabbits, or ducklings under two (2) months of age in any quantity less than six (6).

(b) It is unlawful for any person, firm, or corporation to sell, offer for sale, barter, give away, or display living baby chicks, rabbits, or ducklings that have been dyed, colored, or otherwise treated so as to impart to them an artificial color.

(c) This section shall not be construed to prohibit the sale or display of natural baby chicks, rabbits, or ducklings in a proper brooder facility by a hatchery or store engaged in the business of selling them for commercial purposes.

(d) Any person, firm, or corporation violating any provision of this section upon conviction is deemed guilty of a Class C misdemeanor.

(e) Nothing in this section prohibits a grower of living baby chicks, rabbits, ducklings, or other fowl from selling or making gifts of them in quantities the grower deems appropriate.

History. Acts 1977, No. 792, § 1;
A.S.A. 1947, § 41-4101.

5-62-122. Permitting livestock to run at large.

(a) A person commits the offense of permitting livestock to run at large if being the owner or person charged with the custody and care of livestock he or she knowingly permits the livestock to run at large.

(b) As used in this section, "livestock" includes horses, mules, cattle, goats, sheep, swine, chickens, ducks, and similar animals and fowl commonly raised or used for farm purposes.

(c)(1) Except as provided in subdivision (c)(2) of this section, permitting livestock to run at large is a violation and upon conviction a person may be subject to a fine not to exceed one hundred dollars (\$100).

(2) Any person who allows any hog to run at large is guilty of a violation and upon conviction is subject to a fine not to exceed five hundred dollars (\$500).

History. Acts 1975, No. 280, § 2919;
A.S.A. 1947, § 41-2919; Acts 1999, No.
457, § 4; 2005, No. 1994, § 183.

Amendments. The 2005 amendment

inserted "and upon conviction may be subject to a fine not to exceed one hundred dollars (\$100)" in (c)(1); and substituted "violation" for "misdemeanor" in (c)(2).

CASE NOTES

ANALYSIS

Civil liability.
Owner.

Civil Liability.

For cases discussing civil liability, see *Poole v. Gillison*, 15 F.R.D. 194 (E.D. Ark. 1953); *Rogers v. Stillman*, 223 Ark. 779, 268 S.W.2d 614 (1954); *Oliver v. Jones*, 239 Ark. 572, 393 S.W.2d 248 (1965); *Prickett v. Farrell*, 248 Ark. 996, 455 S.W.2d 74 (1970) (preceding decisions under prior law).

Owner.

Person who kept pony on his premises, fed it, and paid to have it shod exercised sufficient control over the pony to be considered the owner of the pony. *Prickett v. Farrell*, 248 Ark. 996, 455 S.W.2d 74 (1970) (decision under prior law).

Cited: *Cosby v. Oliver*, 265 Ark. 156, 577 S.W.2d 399 (1979); *Sanders v. Mincey*, 317 Ark. 398, 879 S.W.2d 398 (1994).

5-62-123. Larceny of animals including carcasses and flesh.

Upon an indictment for the larceny of any animal that it is a felony to steal, a conviction may be had for the larceny of the carcass of the animal, or of the flesh of the animal, if the carcass has been dismembered, as the evidence in the case may warrant.

History. Init. Meas. 1936, No. 3, § 21,
Acts 1937, p. 1384; Pope's Dig., § 3850;
A.S.A. 1947, § 43-2156.

5-62-124. Unlawful bear exploitation.

(a) A person commits the offense of unlawful bear exploitation if he or she knowingly:

(1) Promotes, engages in, or is employed at a bear wrestling match;
 (2) Receives money for the admission of another person to a place kept for bear wrestling;

(3) Sells, purchases, possesses, or trains a bear for bear wrestling; or

(4) For purposes of exploitation, subjects a bear to surgical alteration in any form, including, but not limited to, declawing, tooth removal, and severing tendons.

(b) Unlawful bear exploitation is a Class D felony.

(c) Upon the arrest of any person for violating a provision of this section, the arresting law enforcement officer or animal control officer may seize and take custody of any bear in the possession of the arrested person.

(d)(1) Upon the conviction of any person for violating a provision of this section, any court of competent jurisdiction may order the forfeiture by the convicted person of any bear the use of which was the basis of the conviction.

(2) Any bear ordered forfeited under a provision of this section shall be placed in the custody of a society which is incorporated for the prevention of cruelty to animals.

(e) In addition to the fines, penalties, and forfeitures imposed under a provision of this section, the court may require the defendant to make restitution to the state, any of its political subdivisions, or a society which is incorporated for the prevention of cruelty to animals for housing, feeding, or providing medical treatment to a bear used for unlawful wrestling.

History. Acts 1989, No. 346, § 1.

SUBCHAPTER 2 — FARM ANIMAL AND RESEARCH FACILITIES

SECTION.

5-62-201. Findings of the General Assembly.

5-62-202. Definitions.

SECTION.

5-62-203. Offenses.

5-62-204. Penalties.

5-62-201. Findings of the General Assembly.

(a) The General Assembly finds that:

(1) The caring, rearing, feeding, breeding, and sale of animals and animal products and the use of animals in research, testing, and education represent vital segments of the economy of the state;

(2) Producers and others involved in the production and sale of animals and animal products and the use of animals in research and education have a vested interest in protecting the health and welfare of animals and the physical and intellectual property rights which they have in animals; and

(3) There has been an increasing number of illegal acts committed against farm animal and research facilities.

(b) The General Assembly further finds that these illegal acts threaten the production of agricultural products and jeopardize crucial scientific, biomedical, or agricultural research.

(c) Finally, the General Assembly finds that these illegal acts threaten the public safety, by exposing communities to contagious diseases and damage research.

History. Acts 1991, No. 1006, § 2.

5-62-202. Definitions.

As used in this subchapter:

(1) "Animal" means any warm or cold blooded animal used in food or fiber production, agriculture, research, testing, or education, including poultry, fish, and insects;

(2) "Animal facility" means any vehicle, building, structure, or premises, where an animal or animal records are kept, handled, housed, exhibited, bred, or offered for sale;

(3) "Consent" means assent in fact, whether express or apparent;

(4) "Deprive" means to:

(A) Withhold an animal or other property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the animal or property is lost to the owner;

(B) Restore an animal or other property only upon payment of reward or other compensation; or

(C) Dispose of an animal or other property in a manner that makes recovery of the animal or property by the owner unlikely;

(5) "Effective consent" means consent by a person legally authorized to act for the owner. Consent is not effective:

(A) If induced by force, threat, false pretense, or fraud;

(B) If given by a person the actor knows is not legally authorized to act for the owner;

(C) If given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the actor to be unable to make reasonable decisions; or

(D) If given solely to detect the commission of an offense;

(6) "Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor;

(7) "Person" means any individual, corporation, association, non-profit corporation, joint stock company, firm, trust, partnership, two (2) or more persons having a joint or common interest, or other legal entity; and

(8) "Possession" means actual care, custody, control, or management.

History. Acts 1991, No. 1006, § 1.

5-62-203. Offenses.

(a) A person commits an offense if, without the effective consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility, with the intent to:

- (1) Deprive the owner of the animal facility, animal, or property; and
- (2) Disrupt or damage the enterprise conducted at the animal facility.

(b) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person damages or destroys:

- (1) An animal facility; or
- (2) Any animal or property in or on an animal facility.

(c) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person:

- (1) Enters an animal facility, not then open to the public, with the intent to commit an act prohibited by this section;
- (2) Remains concealed, with the intent to commit an act prohibited by this section, in an animal facility; or
- (3) Enters an animal facility and commits or attempts to commit an act prohibited by this section.

(d)(1) A person commits an offense if, without the effective consent of the owner and with the intent to disrupt or damage the enterprise conducted at the animal facility, the person:

- (A) Enters or remains in an animal facility; and
- (B) Had notice that the entry was forbidden or received notice to depart but failed to depart.

(2) As used in this subsection, "notice" means:

- (A) Oral or written communication by the owner or someone with apparent authority to act for the owner;
- (B) Fencing or other enclosure obviously designed to exclude intruders or to contain animals; or
- (C) A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

History. Acts 1991, No. 1006, § 3.

5-62-204. Penalties.

(a) Any person who violates any provision of this subchapter is deemed guilty of a Class D felony.

(b) Any persons convicted of violating any provision of this subchapter shall be ordered to make restitution to the animal facility in the full amount of the reasonable cost of:

- (1) Replacing materials, data, equipment, or animals, and records that may have been damaged or cannot be returned; and

(2) Repeating any experimentation that may have been interrupted or invalidated as a result of the violation.

(c) Nothing in this subchapter shall be construed to affect any other right of a person that has been damaged by reason of a violation of this subchapter.

History. Acts 1991, No. 1006, § 4.

CHAPTER 63

BUSINESS MISCONDUCT

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. OFFENSES GENERALLY.
3. DEBT ADJUSTING.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-63-201. Tickets to school athletic events or music entertainment events — Sale in excess of regular price.
- 5-63-202. Requiring borrower to pay contribution to substitute one

SECTION.

- insurance policy for another.
- 5-63-203. [Repealed.]
- 5-63-204. Automated telephone solicitation.

Effective Dates. Acts 1981, No. 947, § 5: became law without Governor's signature, Apr. 8, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that a number of individuals and firms are using public telephone systems for the making of automated telephone solicitations which invade the privacy of individuals, and imposes unsolicited and undue burdens upon thousands of individuals in this

State and that immediate passage of this Act is necessary to prohibit said automated telephone solicitation and imposing a penalty for violation thereof. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-63-201. Tickets to school athletic events or music entertainment events — Sale in excess of regular price.

(a)(1) It is unlawful for any person, corporation, firm, or partnership to sell or offer for sale any ticket to:

(A) A high school or college athletic event or to an athletic or other event held for the benefit of charity at a greater price than that printed on the ticket; or

(B) Any music entertainment event at a greater price than that printed on the ticket or the box office sale price plus any reasonable charge for handling or credit card use, whichever is the greater.

(2) This subsection shall not apply to an institution of higher education that receives funds per ticket above the face value of that ticket.

(b)(1) Any person, corporation, firm, or partnership violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500).

(2) Every sale or offer for sale is a separate offense.

History. Acts 1955, No. 51, §§ 1, 2; A.S.A. 1947, §§ 41-4151, 41-4152; Acts 1987, No. 21, § 1; 1993, No. 565, § 1; 2005, No. 1994, § 53.

Amendments. The 2005 amendment substituted “violation” for “misdemeanor” in (b)(1).

RESEARCH REFERENCES

Ark. L. Rev. Scalping Tickets to Athletic Events, 9 Ark. L. Rev. 399.

5-63-202. Requiring borrower to pay contribution to substitute one insurance policy for another.

(a) No person, firm, or corporation engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property and no trustee, director, officer, agent, or other employee of any person, firm, or corporation engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property shall directly or indirectly require that a borrower pay a consideration of any kind to substitute the insurance policy of one (1) insurer for that of another insurer.

(b) Any violation of a provision of this section constitutes a violation, and upon conviction the violator shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each offense.

History. Acts 1957, No. 229, §§ 1, 2; A.S.A. 1947, §§ 41-4153, 41-4154; Acts 2005, No. 1994, § 53.

Amendments. The 2005 amendment substituted “violation” for “misdemeanor” in (b).

5-63-203. [Repealed.]

Publisher’s Notes. This section, concerning records of bicycle sales, was repealed by Acts 2005, No. 1994, § 545. The

section was derived from Acts 1957, No. 334, §§ 1, 2; A.S.A. 1947, §§ 41-4155, 41-4156.

5-63-204. Automated telephone solicitation.

(a)(1) It is unlawful for any person to use a telephone for the purpose of offering any goods or services for sale, or for conveying information regarding any goods or services for the purpose of soliciting the sale or purchase of the goods or services, or for soliciting information, gathering data, or for any other purpose in connection with a political campaign when the use involves an automated system for the selection and dialing of telephone numbers and the playing of recorded messages when a message is completed to the called number.

(2) However, nothing in this section prohibits the use of:

(A) A telephone involving an automated system for the selection and dialing of telephone numbers and the play of recorded messages to:

(i) Inform the purchaser of the goods or services concerning receipt and availability of the goods or services for delivery to the purchaser; or

(ii) Convey information concerning any delay or pertinent information about the current status of any purchase order previously made; or

(B) An automated telephone system with a recorded message when the call is made or message given solely in response to a call initiated by the person to which the automatic call or recorded message is directed.

(b) Any person who violates any provision of this section upon conviction is guilty of a Class B misdemeanor and shall be punished accordingly.

(c)(1) The Attorney General, a prosecuting attorney, any law enforcement officer, or any telephone company serving an area from which automated telephone calls are made may seek injunctive relief to enforce the provision of this section.

(2) If a civil action is filed pursuant to this section, the prevailing party is entitled to a reasonable attorney's fee and court costs.

History. Acts 1981, No. 947, §§ 1-3;
A.S.A. 1947, §§ 41-4162 — 41-4164.

CASE NOTES

Cited: Potomac Leasing Co. v. Vitality
Ctrs., Inc., 290 Ark. 265, 718 S.W.2d 928
(1986).

SUBCHAPTER 3 — DEBT ADJUSTING**SECTION.**

5-63-301. Definitions.

5-63-302. Debt adjusting — Prohibition.

5-63-303. Debt adjusting — Injunction
against operation — Re-
ceivership.

SECTION.

5-63-304. Debt adjusting — Penalties.

5-63-305. Debt adjusting law — Exclu-
sions.

Effective Dates. Acts 1983, No. 189, § 4: Feb. 15, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that nonprofit organizations giving debt management service for a fee not to exceed the amount of expenses incurred in giving such service should not be considered debt adjust-

ers for purposes of Act 61 of 1967, and that this Act is immediately necessary to grant such exemption. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-63-301. Definitions.

As used in this subchapter:

(1) "Debt adjuster" means a person who engages in, attempts to engage in, or offers to engage in the practice or business of debt adjusting;

(2) "Debt adjusting" means the:

(A) Entering into or making of a contract, express or implied, with a particular debtor in which the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business that, for a consideration, agrees to distribute, or distributes, the money among certain specified creditors in accordance with an agreed upon plan; or

(B) Business or practice of any person that holds oneself out as acting or offering or attempting to act for a consideration as an intermediary between a debtor and the debtor's creditors for the purpose of settling, compounding, or in anyway altering the terms of payment of any debt of a debtor and, to that end, receives money or other property from the debtor or on behalf of the debtor for the payment to or distribution among the creditors of the debtor;

(3) "Debtor" means an individual and includes two (2) or more individuals who are jointly and severally, or jointly or severally, indebted to a creditor; and

(4) "Person" includes an individual, partnership, association, and corporation.

History. Acts 1967, No. 61, § 1; A.S.A. 1947, § 41-4157.

5-63-302. Debt adjusting — Prohibition.

No person shall engage in, or offer to or attempt to engage in, the business or practice of debt adjusting in this state.

History. Acts 1967, No. 61, § 2; A.S.A. 1947, § 41-4158.

5-63-303. Debt adjusting — Injunction against operation — Receivership.

(a) In an action brought in the name of the state by a prosecuting

attorney within his or her district or by the Attorney General, a circuit court has jurisdiction to enjoin any person from:

- (1) Acting, offering to act, or attempting to act as a debt adjuster; or
- (2) Engaging in the business of debt adjusting.

(b) In an action under subsection (a) of this section, the circuit court may appoint a receiver for the property and money employed in the transaction of business by the person as a debt adjuster, to insure, so far as may be possible, the return to debtors of so much of their money and property as has been received by the debt adjuster and has not been paid to the creditors of the debtors.

History. Acts 1967, No. 61, § 3; A.S.A. 1947, § 41-4159.

5-63-304. Debt adjusting — Penalties.

Any person who acts or offers to act as a debt adjuster in this state is guilty of a Class A misdemeanor.

History. Acts 1967, No. 61, § 4; A.S.A. 1947, § 41-4160; Acts 2005, No. 1994, § 223.

Amendments. The 2005 amendment substituted “guilty of a Class A misdemeanor” for “deemed guilty of a misde-

meanor and upon conviction shall be subject to a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail not to exceed one (1) year, or by both fine and imprisonment.”

5-63-305. Debt adjusting law — Exclusions.

The following persons are not considered a debt adjuster for the purposes of this subchapter:

- (1) An attorney at law;
- (2) A bank, fiduciary, or financing and lending institution as authorized and admitted to transact business in this state and performing credit and financial adjusting services in the regular course of its principal business;
- (3) A title insurer or abstract company, while doing an escrow business;
- (4) An employer, for its employees;
- (5) A judicial officer or another person acting pursuant to court order;
- (6) A nonprofit organization giving debt management service without fee or charge or with a fee if the fee is in an amount not to exceed the amount of actual expenses incurred in offering the debt management service; and
- (7) An association, for its members.

History. Acts 1967, No. 61, § 5; 1983, No. 189, § 2; A.S.A. 1947, § 41-4161.

CHAPTER 64

CONTROLLED SUBSTANCES

SUBCHAPTER.

1. UNIFORM CONTROLLED SUBSTANCES ACT — DEFINITIONS.
2. UNIFORM CONTROLLED SUBSTANCES ACT — DESIGNATION OF CONTROLLED SUBSTANCES.
3. UNIFORM CONTROLLED SUBSTANCES ACT — REGULATION OF DISTRIBUTION.
4. UNIFORM CONTROLLED SUBSTANCES ACT — PROHIBITIONS AND PENALTIES.
5. UNIFORM CONTROLLED SUBSTANCES ACT — ENFORCEMENT AND ADMINISTRATION.
6. UNIFORM CONTROLLED SUBSTANCES ACT — MISCELLANEOUS. [REPEALED.]
7. PROVISIONS RELATING TO THE UNIFORM CONTROLLED SUBSTANCES ACT.
8. SALE OF DRUG DEVICES.
9. CIVIL ACTIONS AGAINST SELLERS OF DRUG PARAPHERNALIA.
10. RECORDS OF TRANSACTIONS.
11. EPHEDRINE.
12. NITROUS OXIDE.
13. ANHYDROUS AMMONIA.

A.C.R.C. Notes. Though Arkansas adopted the major provisions of the Uniform Controlled Substances Act of 1970 by Acts 1971, No. 590, which is codified in this chapter, subsequent nonuniform amendments to this chapter have caused this chapter to substantially depart from the official text of the uniform act. As a result, the entire chapter, including sections based on the uniform act, has been conformed to the style of the Arkansas Code.

References to “this chapter” in subchapters 1-10 may not apply to

subchapters 11-13 which were enacted subsequently.

Cross References. Administering controlled substance to another, § 5-13-210.

Videotaped depositions of state crime laboratory analysts, § 16-43-215.

Drug Abuse Control Act, § 20-64-301 et seq.

Immunity of teachers reporting drug abuse, § 6-17-107.

Institutionalizing of drug addicts, § 20-64-801 et seq.

Uniform Narcotic Drug Act, § 20-64-201 et seq.

RESEARCH REFERENCES

ALR. Odor of narcotics as providing probable cause for warrantless search. 5 ALR 4th 681.

State and local administrative inspection of and administrative warrants to search pharmacies. 29 ALR 4th 264.

Am. Jur. 25 Am. Jur. 2d, Drugs, §§ 9-36 and § 55 et seq.

C.J.S. 28 C.J.S. Supp., Drugs, § 117 et seq.

CASE NOTES

Cited: Leavy v. State, 314 Ark. 231, 862 S.W.2d 832 (1993).

SUBCHAPTER 1 — UNIFORM CONTROLLED SUBSTANCES ACT — DEFINITIONS

SECTION.

5-64-101. Definitions.

Publisher's Notes. For Comments regarding the Uniform Controlled Substances Act, see Commentaries Volume B.

Effective Dates. Acts 1975, No. 305, § 4: Mar. 3, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971 upon the possession of marijuana and the penalty therefor; that the problem of drug abuse in this state is increasing at an alarming rate and that additional provisions are needed to assist in enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 78, § 7: became law without Governor's signature, Feb. 15, 1981. Emergency clause provided: "It is hereby found and determined by the Gen-

eral Assembly that there is an increasing problem of drug abuse in the State of Arkansas and that in order to protect the public health and safety immediate steps must be taken to enact a comprehensive Drug Paraphernalia Act and the immediate passage of this Act is necessary to accomplish this purpose; therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force from and after its passage and approval."

Acts 1983, No. 787, § 10: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an increasing problem of counterfeit substances in the State of Arkansas and that in order to protect the public health and safety, immediate steps must be taken to establish a system of punishment for those possessing or distributing such substances. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 10
UALR L.J. 559.

5-64-101. Definitions.

As used in this chapter:

(1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:

(A) A practitioner; or

(B) The patient or research subject at the direction and in the presence of the practitioner;

(2)(A) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser.

(B) "Agent" does not include a common or contract carrier, public warehouseman, or employee of the common or contract carrier or warehouseman;

(3)(A) "Anabolic steroid" means any drug or hormonal substance, chemically and pharmacologically related to testosterone, other than estrogens, progestin, and corticosteroid that promotes muscle growth.

(B)(i) "Anabolic steroid" does not include an anabolic steroid that is expressly intended for administration through an implant to cattle or another nonhuman species and that has been approved by the Director of the Division of Health of the Department of Health and Human Services for such administration.

(ii) If any person prescribes, dispenses, or distributes a steroid described in subdivision (3)(B)(i) of this section for human use, the person is considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this subdivision (3);

(4) "Bureau" means the Drug Enforcement Administration of the United States Department of Justice or its successor agency;

(5) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VI;

(6)(A) "Counterfeit substance" means a noncontrolled substance, that by overall dosage unit appearance (including color, shape, size, markings, packaging, labeling, and overall appearance) or upon the basis of representations made to the recipient, purports to be a controlled substance or to have the physical or psychological effect associated with a controlled substance.

(B) In determining whether a substance is a "counterfeit substance", the following factors shall be utilized and a finding of any two (2) of these factors constitutes prima facie evidence that the substance is a "counterfeit substance":

(i) A statement made by an owner or by anyone else in control of the substance concerning the nature of the substance, its use, or effect;

(ii) The physical appearance of the finished product containing the noncontrolled substance is substantially the same as that of a specific controlled substance;

(iii) The noncontrolled substance is unpackaged or is packaged in a manner normally used for the illegal delivery of a controlled substance;

(iv) The noncontrolled substance is not labeled in accordance with 21 U.S.C. § 352 or 21 U.S.C. § 353;

(v) The person delivering, attempting to deliver, or causing delivery of the noncontrolled substance states or represents to the recipient that the noncontrolled substance may be resold at a price that substantially exceeds the value of the substance;

(vi) An evasive tactic or action utilized by the owner or person in control of the substance to avoid detection by a law enforcement authority; or

(vii) A prior conviction, if any, of an owner, or anyone in control of the object under a state or federal law related to a controlled substance or fraud;

(7) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship;

(8) "Director" means the Director of the Division of Health of the Department of Health and Human Services or his or her duly authorized agent;

(9) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the controlled substance for that delivery;

(10) "Dispenser" means a practitioner who dispenses;

(11) "Distribute" means to deliver other than by administering or dispensing a controlled substance;

(12) "Distributor" means a person who distributes;

(13)(A) "Drug" means a substance:

(i) Recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them;

(ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(iii) Other than food intended to affect the structure or any function of the body of humans or animals; and

(iv) Intended for use as a component of any article specified in subdivisions (13)(A)(i), (ii), or (iii) of this section.

(B) "Drug" does not include a device or its components, parts, or accessories;

(14)(A) "Drug paraphernalia" means any equipment, product, and material of any kind that are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

(B) "Drug paraphernalia" includes, but is not limited to:

(i) A kit used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting any species of plant that is a controlled substance or from which a controlled substance can be derived;

(ii) A kit used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance;

(iii) An isomerization device used, intended for use, or designed for use in increasing the potency of any species of plant that is a controlled substance;

(iv) Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of a controlled substance;

(v) A scale or balance used, intended for use, or designed for use in weighing or measuring a controlled substance;

(vi) A diluent or adulterant, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting a controlled substance;

(vii) A separation gin or sifter used, intended for use, or designed for use in removing a twig or seed from, or in otherwise cleaning or refining, marijuana;

(viii) A blender, bowl, container, spoon, or mixing device used, intended for use, or designed for use in compounding a controlled substance;

(ix) A capsule, balloon, envelope, or other container used, intended for use, or designed for use in packaging a small quantity of a controlled substance;

(x) A container or other object used, intended for use, or designed for use in storing or concealing a controlled substance;

(xi) A hypodermic syringe, needle, or other object used, intended for use, or designed for use in parenterally injecting a controlled substance into the human body; and

(xii) An object used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;

(b) A water pipe;

(c) A carburetion tube or device;

(d) A smoking or carburetion mask;

(e) A roach clip, meaning an object used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;

(f) A miniature cocaine spoon or cocaine vial;

(g) A chamber pipe;

(h) A carburetor pipe;

(i) An electric pipe;

(j) An air-driven pipe;

(k) A chillum;

(l) A bong; and

(m) An ice pipe or chiller.

(C) In determining whether an object is “drug paraphernalia”, a court or other authority should consider, in addition to any other logically relevant factor, the following:

(i) A statement by an owner or by anyone in control of the object concerning its use;

(ii) A prior conviction, if any, of an owner or of anyone in control of the object under any state or federal law relating to any controlled substance;

(iii) The proximity of the object in time and space to a direct violation of this chapter;

(iv) The proximity of the object to a controlled substance;

(v) The existence of any residue of a controlled substance on the object;

(vi)(a) Direct or circumstantial evidence of the intent of an owner or of anyone in control of the object to deliver it to a person whom he or she knows, or should reasonably know, intends to use the object to facilitate a violation of this chapter.

(b) The innocence of an owner or of anyone in control of the object as to a direct violation of this chapter does not prevent a finding that the object is intended for use or designed for use as “drug paraphernalia”;

(vii) An oral or written instruction provided with the object concerning its use;

(viii) Descriptive materials accompanying the object that explain or depict its use;

(ix) National and local advertising concerning the object’s use;

(x) The manner in which the object is displayed for sale;

(xi) Whether the owner or anyone in control of the object is a legitimate supplier of a like or related item to the community, such as a licensed distributor or dealer of a tobacco product;

(xii) Direct or circumstantial evidence of the ratio of sales of the objects to the total sales of the business enterprise;

(xiii) The existence and scope of legitimate uses for the object in the community; and

(xiv) Expert testimony concerning the object’s use;

(15) “Immediate precursor” means a substance that the director has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and that is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture;

(16)(A) “Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from a substance of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

(B) “Manufacture” includes any packaging or repackaging of a controlled substance or labeling or relabeling of a controlled substance’s container.

(i) By a practitioner as an incident to his or her administering or dispensing of a controlled substance in the course of his or her professional practice; or

(ii) By a practitioner or by his or her authorized agent under his or her supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale;

(17)(A) “Marijuana” means:

(i) All parts and any variety and/or species of the plant Cannabis that contains THC (Tetrahydrocannabinol) whether growing or not;

(ii) The seeds of the plant;

- (iii) The resin extracted from any part of the plant; and
- (iv) Every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.

(B) "Marijuana" does not include:

- (i) The mature stalks of the plant;
- (ii) Fiber produced from the stalks;
- (iii) Oil or cake made from the seeds of the plant;
- (iv) Any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted from the mature stalks);
- (v) Fiber, oil, or cake; or
- (vi) The sterilized seed of the plant that is incapable of germination;

(18)(A)(i) "Narcotic drug" means any drug that is defined as a narcotic drug by order of the director.

(ii) In the formulation of a definition of "narcotic drug", the director shall:

(a) Include any drug that he or she finds is narcotic in character and by reason of being narcotic is dangerous to the public health or is promotive of addiction-forming or addiction-sustaining results upon the user that threaten harm to the public health, safety, or morals; and

(b) Take into consideration the provisions of the federal narcotic laws as they exist from time to time and shall amend the definitions so as to keep them in harmony with the definitions prescribed by the federal narcotic laws, so far as is possible under the standards established in this subdivision (18) and under the policy of this chapter.

(B) "Narcotic drug" also means any of the following, whether produced directly or indirectly by extraction from a substance of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i)(a) Opium, opiates, a derivative of opium or opiates, including their isomers, esters, and ethers whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation.

(b) "Narcotic drug" does not include an isoquinoline alkaloid of opium;

(ii) Poppy straw and concentrate of poppy straw;

(iii) Coca leaves, except coca leaves and extracts of coca leaves from which cocaines, ecgonine, and derivatives of ecgonine or their salts have been removed;

(iv) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(v) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(vi) Any compound, mixture, or preparation that contains any quantity of any substance referred to in subdivisions (18)(B)(i)-(v);

(19) "Noncontrolled substance" means any liquid, substance, or material not listed in Schedules I through VI of the Schedules of Controlled Substances promulgated by the director;

(20) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity;

(21) "Practitioner" means:

(A) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state; and

(B) A pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state;

(22) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance;

(23) "State" when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America; and

(24) "Ultimate user" means a person who lawfully possesses a controlled substance for:

(A) The person's own use;

(B) The use of a member of the person's household; or

(C) Administering to an animal owned by the person or by a member of his or her household.

History. Acts 1971, No. 590, Art. 1, § 1; 1975, No. 243, § 1; 1975, No. 305, § 1; 1979, No. 898, §§ 1, 2; 1981, No. 78, § 1; 1981, No. 116, § 1; 1983, No. 787, §§ 1, 2; A.S.A. 1947, § 82-2601; Acts 1987, No. 42, § 2; 1991, No. 570, § 1; 1995, No. 1296, § 7; 2005, No. 1994, § 301.

Publisher's Notes. Schedules I through VI referred to in this section are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

As originally enacted, Acts 1971, No. 590, Art. 6, § 6, established the Narcotic and Toxic Substances Control Division, which was headed by a commissioner, in

the Department of Public Safety. That section was rendered obsolete by Acts 1981, No. 45, § 1, which abolished the Department of Public Safety.

Pursuant to subdivision (8) of this section, the duties formerly assigned to the Narcotic and Toxic Substances Control Commissioner under this chapter are now performed by the Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent.

Amendments. The 2005 amendment deleted "subchapters 1-6 of" following "As used in" in the introductory language; added present (3), (8), (14), and (19), and redesignated the remaining subsections accordingly; deleted former (u)-(x); deleted "The term" preceding "counterfeit substance" in present (6); inserted "or her" in in present (16)(B); inserted "or she" in in present (18)(A)(ii)(a); and corrected the internal reference in present (18)(B)(vi).

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

Legislative Survey, Criminal Law, 8 UALR L.J. 559.

CASE NOTES

ANALYSIS

- Constitutionality.
- Controlled substance.
- Deliver or delivery.
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- Usable amount.

Constitutionality.

Although the defendant offered testimony that marijuana was not as harmful as alcohol or tobacco, the evidence presented by the defendant was not so overwhelming and uncontradicted as to convince the court that the Controlled Substances Act was arbitrary, capricious and unreasonable and, therefore, violated the due process clause and the equal protection clause of the United States Constitution. *Bushong v. State*, 267 Ark. 113, 589 S.W.2d 559 (1979), cert. denied, 446 U.S. 938, 100 S. Ct. 2157, 64 L. Ed. 2d 791 (1980).

Former subsection (y) of this section (see now subsection (v)) and § 5-64-403(c)(1) concerning the term “drug paraphernalia” are not unconstitutionally vague for want of “certainty” or “definiteness,” since they give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

The drug paraphernalia law is not unconstitutionally vague, because the detailed definitions found in the statute give adequate notice of conduct constituting the offense. *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992).

Controlled Substance.

When doubts as to construction of use of term “controlled substance” in definition section was considered in light of strict construction, possession of drugs classi-

fied in schedule of act to provide separate classifications for marijuana and another substance did not constitute a misdemeanor. *White v. State*, 260 Ark. 361, 538 S.W.2d 550 (1976).

Cocaine is a Schedule II controlled substance. *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

Evidence was sufficient to support defendant’s conviction for possession of methamphetamine with intent to deliver where defendant had control over the 16 grams of methamphetamine, he stated that he had already sold some before arriving at the motel, and defendant offered to sell the remainder to an undercover police officer. *Dodson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 494 (Sept. 16, 2004).

Deliver or Delivery.

Defendant who testified that the sale of drugs was actually between the officer and a third person, although he did get the drugs and give them to the officer and took the money for the drugs and gave it to the third person, was properly convicted for violating Controlled Substances Act. *Snelling v. State*, 257 Ark. 602, 519 S.W.2d 52 (1975).

Under the definition of deliver or delivery it makes no difference, on a motion for directed verdict, whether the transferor acts as an agent for the purchaser or the seller. *Curry v. State*, 258 Ark. 528, 527 S.W.2d 902 (1975).

Person who drove parties to address where sale of controlled substance was made could not defend on ground that he was a mere bystander where there was substantial evidence to show that he not only stood by, but aided, abetted and assisted in the delivery. *Fant v. State*, 258 Ark. 1015, 530 S.W.2d 364 (1975).

Where the defendant simply introduced the undercover officers to the sellers of controlled substance from whom the officers bought some controlled substance, the

defendant was not guilty of delivering controlled substance since he would have had to take a more active part to be a principal or even an accomplice. *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980).

The exchange of something of value is not essential to the offense of delivery of a controlled substance. *Anderson v. State*, 275 Ark. 298, 630 S.W.2d 23 (1982).

The requirement that delivery be "in exchange for money or anything of value" was intended to make the comparatively severe penalty for delivery inapplicable to a gratuitous transfer, such as the action of two or more persons in smoking one marijuana cigarette by passing it around; the legislature, however, left intact the Uniform Act's provision that a delivery includes an attempted transfer and, accordingly, where the jury could find from substantial evidence that defendant attempted to transfer controlled substance in exchange for an agreed sum of money and had completed his part of the transaction, the proof was sufficient to support conviction even though the exchange of money was not completed. *Anderson v. State*, 275 Ark. 298, 630 S.W.2d 23 (1982).

Subdivision (f) of this section only requires the attempted transfer of drugs in exchange for an agreed price; the exchange of drugs for money or anything of value is not essential to the commission of the offense. *Marshall v. State*, 289 Ark. 462, 712 S.W.2d 894 (1986).

Definition of "sale" is included in the definition of "deliver" as both involve a transfer of an item in exchange for money. *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987).

Prescription of a controlled substance by a licensed physician is not "delivery" of a controlled substance. *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

The fact that an accused is the agent of a buyer or seller of drugs does not remove the transfer of rock cocaine from the coverage of subsection (f). *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990).

To convict a defendant of delivery under subsection (f), the state had to prove that the defendant actually or constructively transferred drugs for value to another person; to convict one of possession, the state had to show that the defendant exercised control or dominion over it. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823

(1993), cert. denied, 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994).

Under the definition of "deliver" in this section, it makes no difference whether the transferor acted as an agent of the purchaser or the seller; the act is condemned whenever the transfer is in exchange for money or anything of value. *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994).

Drug Paraphernalia.

Acts 1981, No. 78 which, in pertinent part added subsection (y) (now subsection (v)), is not unconstitutionally overbroad even though the act may prevent persons from utilizing the expressions imprinted on, or the symbolic speech represented by the use of, drug paraphernalia. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

Where defendants were arrested in a parking lot after buying various items, including three packages of antihistamines, four cans of starter fluid, butane, and an air freshener, the evidence was insufficient to support a conviction of possession of drug paraphernalia with intent to manufacture methamphetamines; all of the items seized were legally obtained and had legitimate uses, and suspicion alone cannot support a conviction. *Gilmore v. State*, 79 Ark. App. 303, 87 S.W.3d 805 (2002).

Iodine is not drug paraphernalia because it is merely a drug ingredient and this section, as a general statute, is required to yield to the more specific statutes regarding drug ingredients in §§ 5-64-1101 and 1102; therefore, an owner's motion for a directed verdict should have been granted because money found during a body search was not found in close proximity to drug paraphernalia. § 735 in *U.S. Currency v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 265 (Mar. 23, 2005).

Evidence.

It is not essential to proof of the charge of attempting to deliver a controlled substance that the substance be produced in court if one sufficiently experienced with the substance could testify that it was indeed that substance. *Marshall v. State*, 289 Ark. 462, 712 S.W.2d 894 (1986).

Evidence was sufficient to meet test of substantiality and show delivery. *Summers v. State*, 300 Ark. 525, 780 S.W.2d 540 (1989).

Evidence was sufficient to establish delivery of controlled substance. *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991).

There was insufficient evidence to support a conviction for possession of drug paraphernalia where the court precluded the state from showing that pieces of antenna found on the defendant were commonly used as drug paraphernalia. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), supplemental op., remanded, on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991).

Court erroneously precluded state from introducing evidence of officer concerning use of antenna, found on the defendant, as drug paraphernalia. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), supplemental op., remanded, on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991).

Evidence sufficient to support conviction for delivery of a controlled substance. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Evidence sufficient to find that appellant engaged in a conspiracy to deliver marijuana. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Where officer asked defendant for consent to search home and defendant stated he wanted to call his attorney and went back into the house, and officer simply followed defendant into the house, officer's entry into the home was illegal and not supported by unequivocal proof of consent required by state caselaw; therefore, products seized as a result of the illegal entry and search were fruit of the poisonous tree and should have been suppressed. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002).

Sufficient evidence was presented to the jury from which they could conclude that defendant possessed certain items for the purpose of manufacturing methamphetamine despite the fact that there was no evidence of lithium which was necessary to the manufacturing process. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003).

Evidence of manufacturing methamphetamine held sufficient where evidence other than the accomplices' testimony tended to a substantial degree to connect defendant with the commission of the crime, and where there was sufficient corroboration of the accomplices' testimony.

Brown v. State, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

State's failure to prove that a substance was a statutorily-defined "counterfeit substance" was fatal to defendant's criminal conviction for possession of a counterfeit substance with the intent to deliver, especially where there was no evidence of attempted delivery; the only factor that the state proved was that the physical appearance of the finished product containing the noncontrolled substance was substantially the same as that of a specific controlled substance. *Jackson v. State*, 86 Ark. App. 145, 165 S.W.3d 467 (2004).

Evidence was sufficient to sustain a drug possession conviction where defendant was the driver of the car, the drugs were found directly behind the driver's seat, and he exercised dominion and control over the vehicle; in addition, defendant possessed 883.9 milligrams of the methamphetamine compound, which was a usable amount. *Jones v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 352 (May 27, 2004).

Evidence was sufficient to sustain a drug paraphernalia possession conviction where the syringe in defendant's pocket was in close proximity to the methamphetamine found in the plastic bags behind his driver's seat. *Jones v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 352 (May 27, 2004).

Given that defendant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of manufacturing methamphetamine. *Lueken v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 857 (Nov. 17, 2004).

Evidence was sufficient to sustain a conviction for possession of drug paraphernalia with intent to manufacture methamphetamine where items found in defendant's possession included a toluene can, a box of table salt and plastic jugs containing muriatic acid, drain cleaner, lye, isopropyl alcohol, allergy pills, a short length of rubber tubing, a box of disposable PVC gloves, a used coffee filter, a bottle of hydrogen peroxide, a bottle of rubbing alcohol, and a syringe; further, although this was not a complete list of

items necessary to manufacture methamphetamine, improperly admitted evidence regarding defendant's prior conviction for conspiracy to manufacture methamphetamine was properly considered in determining the sufficiency of the evidence. *Cluck v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 453 (June 8, 2005).

Manufacture and Production.

Former subsections (m) and (u) (n26 subsection (r)) pointed out respectively that "manufacture" included "production" and that "production" included "cultivation" of a controlled substance. *Shepherd v. State*, 256 Ark. 134, 506 S.W.2d 553, cert. denied, 419 U.S. 808, 95 S. Ct. 20, 42 L. Ed. 2d 34 (1974).

Manufacture as defined in this section does not include the preparation for one's own use. *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975), cert. denied, 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed. 2d 775 (1977).

Since the personal-use exemption provided for in subdivision (m) applies only to the preparation or compounding of a controlled substance and not to "production" which includes cultivating or harvesting the substance, defendant, who admitted growing marijuana on his farm, was not within that exception to the offense of manufacturing marijuana. *Bedell v. State*, 260 Ark. 401, 541 S.W.2d 297 (1976), cert. denied, 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed. 2d 775 (1977).

The personal use exemption provided for in subdivision (m) did not apply to defendant who manufactured from marijuana seeds and plants a tea and juice which defendant claimed to drink for the cure and prevention of cancer. *Patty v. State*, 260 Ark. 539, 542 S.W.2d 494 (1976).

The substance does not have to be in a form to be sold before a "manufacture" occurs. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989).

Although anhydrous ammonia, which was necessary to the methamphetamine manufacturing process, was not found, the state's chemist testified that ammonia was found, as well as other indications regarding the presence of anhydrous ammonia, which could not be specifically tested for, and that there was not an active manufacture taking place when the

police arrived; thus, the chemist's testimony sufficiently explained the absence of the anhydrous ammonia in a lab where manufacturing had already occurred and the evidence was sufficient to convict defendant of manufacturing methamphetamine. *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004).

Marijuana.

In prosecution for sale of marijuana it was not necessary for the state to show that the substance introduced into evidence as marijuana did not fall within any exemption provision of subsection (n). *Garner v. State*, 258 Ark. 321, 524 S.W.2d 223 (1975); *Rogers v. State*, 258 Ark. 314, 524 S.W.2d 227, cert. denied, 423 U.S. 995, 96 S. Ct. 423, 46 L. Ed. 2d 369 (1975).

This section's definition of marijuana does not require the State to prove the presence of THC in order to obtain a conviction for possession of marijuana; lay testimony may provide substantial evidence of the identity of a controlled substance, even in the absence of expert chemical analysis. *Springston v. State*, 327 Ark. 90, 936 S.W.2d 550 (1997).

Narcotic Drug.

Cocaine is defined as a "narcotic drug" under subdivision (o)(2)(D) of this section and is made a Schedule II controlled substance under the terms of a board regulation adopted in accordance with § 5-64-205. *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988).

Usable Amount.

It was proper to allow both a narcotics officer and a chemist with the state crime lab to testify that, in their opinion, .01 grams of crack cocaine was a usable amount. *Terrell v. State*, 35 Ark. App. 185, 818 S.W.2d 579 (1991).

The trial court did not err in refusing to instruct the jury that for a quantity of drugs to constitute a usable amount it must be sufficient "to have an effect on the human system". *Terrell v. State*, 35 Ark. App. 185, 818 S.W.2d 579 (1991).

Cited: *Fight v. State*, 254 Ark. 927, 497 S.W.2d 262 (1973); *Sims v. State*, 255 Ark. 87, 499 S.W.2d 54 (1973); *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974); *Arkansas State Medical Bd. v. Cross*, 256 Ark. 388, 507 S.W.2d 709 (1974); *Tate v. State*, 258 Ark. 135, 524 S.W.2d 624 (1975); *Ryan v. State*, 260 Ark.

270, 538 S.W.2d 702 (1976); *Hosto v. Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979); *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979); *Hays v. State*, 268 Ark. 701, 597 S.W.2d 821 (Ct. App. 1980); *Young v. State*, 269 Ark. 12, 598 S.W.2d 74 (1980); *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982); *Jackson v. State*, 283 Ark. 301, 675 S.W.2d 820 (1984); *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985); *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985); *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989); *Barlow v. State*, 28 Ark. App. 21, 770

S.W.2d 186 (1989); *Booker v. State*, 32 Ark. App. 94, 796 S.W.2d 854 (1990); *Smith v. State*, 34 Ark. App. 72, 805 S.W.2d 663 (1991); *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992); *Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996); *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997); *Hyde v. State*, 59 Ark. App. 131, 953 S.W.2d 911 (1997); *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001); *Dodson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 897 (Dec. 1, 2004).

SUBCHAPTER 2 — UNIFORM CONTROLLED SUBSTANCES ACT — DESIGNATION OF CONTROLLED SUBSTANCES

SECTION.

- 5-64-201. Director's duties.
- 5-64-202. Nomenclature.
- 5-64-203. Criteria for Schedule I.
- 5-64-204. [Reserved.]
- 5-64-205. Criteria for Schedule II.
- 5-64-206. [Reserved.]
- 5-64-207. Criteria for Schedule III.
- 5-64-208. [Reserved.]

SECTION.

- 5-64-209. Criteria for Schedule IV.
- 5-64-210. [Reserved.]
- 5-64-211. Criteria for Schedule V.
- 5-64-212. Substances in Schedule V.
- 5-64-213. Schedule VI established.
- 5-64-214. Criteria for Schedule VI.
- 5-64-215. Substances in Schedule VI.
- 5-64-216. Schedule revisions.

Publisher's Notes. Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

Acts 1979, No. 898, § 21 provided, in part, that the schedules in effect on July 20, 1979 should remain in effect until rescheduled.

For Comments regarding the Uniform Controlled Substances Act, see *Commentaries* Volume B.

Effective Dates. Acts 2005, No. 256, § 7: Mar. 24, 2005. Emergency clause provided: "It is hereby found and determined by the Eighty-fifth General Assembly that the effectiveness of this act is essential to

the safety of the citizens of Arkansas; that excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine causes harm to citizens of Arkansas; and that a delay in the effective date of this act beyond thirty days needed to implement it would unnecessarily expose the citizens of Arkansas to the risk of irreparable harm. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be effective on: (1) Thirty (30) days from and after the date of its passage and approval; (2) If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days from the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days from the date the last house overrides the veto."

5-64-201. Director's duties.

(a)(1)(A) The Director of the Division of Health of the Department of Health and Human Services shall administer this chapter and may add a substance to or delete or reschedule any substance enumerated in a schedule pursuant to the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(B) However, the director shall not delete any substance from a schedule in effect on July 20, 1979, without prior approval by the Legislative Council.

(2) In making a determination regarding a substance, the director shall consider the following:

(A) The actual or relative potential for abuse;

(B) The scientific evidence of its pharmacological effect, if known;

(C) The state of current scientific knowledge regarding the substance;

(D) The history and current pattern of abuse;

(E) The scope, duration, and significance of abuse;

(F) The risk to public health;

(G) The potential of the substance to produce psychic or physiological dependence liability; and

(H) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(b) After considering the factors enumerated in subsection (a) of this section, the director shall make findings with respect to the factors and issue a rule controlling the substance if he or she finds the substance has a potential for abuse.

(c) If the director designates a substance as an immediate precursor, a substance that is a precursor of the controlled precursor is not subject to control solely because it is a precursor of the controlled precursor.

(d)(1) If any substance is designated as a controlled substance under federal law and notice of the designation is given to the director, the director shall similarly control the substance under this chapter after the expiration of thirty (30) days from publication in the Federal Register of a final order designating a substance as a controlled substance unless within that thirty-day period the director objects to inclusion.

(2)(A) If the director objects to inclusion, the director shall publish the reasons for objection and afford any interested party an opportunity to be heard.

(B) At the conclusion of the hearing, the director shall publish his or her decision.

(C) Any person aggrieved by a decision of the director is entitled to judicial review in the Pulaski County Circuit Court.

(3) Upon publication of objection to inclusion under this chapter by the director, control under this chapter is stayed until the director publishes his or her decision or, if judicial review is sought, the inclusion is stayed until adjudication of the judicial review.

(e) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco.

(f) The director shall schedule gamma-hydroxybutyrate and its known precursors and analogs in a manner consistent with the procedures outlined in this section.

History. Acts 1971, No. 590, Art. 2, § 1; 1973, No. 186, § 1; 1979, No. 898, § 3; A.S.A. 1947, § 82-2602; Acts 2001, No. 320, § 2; 2005, No. 1994, § 302.

A.C.R.C. Notes. Acts 2001, No. 320, § 1, provided:

“(a) Gamma-hydroxybutyrate (‘GHB’) was not scheduled as a controlled substance by the Federal Drug Enforcement Administration or by the Director of the Arkansas Department of Health prior to 1999. Concerned about the potential for the substance’s abuse, the Eighty-second General Assembly designated GHB as a Schedule VI controlled substance.

“(b) Subsequently, the Drug Enforcement Administration classified GHB as a Schedule I. In addition, the final rule of the Drug Enforcement Administration places Food and Drug Administration approved products containing GHB into Schedule III, if or when they are approved.

“(c) Since the legislature classified GHB as a schedule VI substance, the Director was precluded from scheduling GHB in a manner consistent with the scheduling designated by the Drug Enforcement Administration. As a result, criminal sanctions for the possession with the intent to deliver GHB are not as severe as other substances possessing similar harmful and abusive characteristics.

“(d) It is the purpose of this act to allow the director to adopt the Drug Enforcement Administration’s scheduling of GHB pursuant to Arkansas Code 5-64-201.”

Amendments. The 2001 amendment added (f).

The 2005 amendment deleted “subchapters 1-6 of” preceding “this chapter” in (a) and three times in (d); inserted “or she” in (b); and inserted “or her” preceding “decision” in (d).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Alcoholic beverages.
Delegation of authority.
Schedules.

Alcoholic Beverages.

Where school board rule required automatic expulsion for students using “narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971” (subchapters 1-6 of this chapter), alcohol was not a “controlled substance” under such rule since it is expressly exempted from the operation of the act by subsection (e) of this section. *Board of Educ. v. McCluskey*, 458 U.S. 966, 102 S. Ct. 3469, 73 L. Ed. 2d 1273 (1982).

Delegation of Authority.

Although subsection (d) provides that if a substance becomes controlled under federal law it shall also become controlled under state law, that same subsection has also always given the Commissioner the authority to reject the listing of any federally controlled substance; thus, there was no unlawful authority or delegation of legislative power given to the federal government to control the state schedules of controlled substances. *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

Schedules.

Schedule of controlled substances is a regulation promulgated by a state agency pursuant to statute and in accordance with state procedural requirements. The

schedule or agency regulation is a part of the substantive law the trial court must determine and then apply to the facts of the case before it. *Washington v. State*, 319 Ark. 583, 892 S.W.2d 505 (1995).

Cited: *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982).

5-64-202. Nomenclature.

A controlled substance listed or to be listed in a schedule shall be included by whatever official, common, usual chemical, or trade name designated.

History. Acts 1971, No. 590, Art. 2, § 2; 1973, No. 186, § 1; 1979, No. 898, § 4; A.S.A. 1947, § 82-2603.

5-64-203. Criteria for Schedule I.

The Director of the Division of Health of the Department of Health and Human Services shall place a substance in Schedule I if he or she finds that the substance has:

- (1) High potential for abuse; and
- (2) No accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

History. Acts 1971, No. 590, Art. 2, § 3; 1973, No. 186, § 1; 1979, No. 898, § 5; A.S.A. 1947, § 82-2604.

CASE NOTES

Cited: *Pace v. State*, 267 Ark. 610, 593 S.W.2d 20 (1980).

5-64-204. [Reserved.]

Publisher's Notes. The Uniform Controlled Substance Act (U.L.A.), § 204, lists the controlled substances included in Schedule I. Schedule I was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and republished annually by the Director

of the Division of Health of the Department of Health and Human Services or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

5-64-205. Criteria for Schedule II.

The Director of the Division of Health of the Department of Health and Human Services shall place a substance in Schedule II if he or she finds that:

- (1) The substance has high potential for abuse;
- (2) The substance has currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and

(3) The abuse of the substance may lead to severe psychic or physical dependence.

History. Acts 1971, No. 590, Art. 2, § 5; 1973, No. 186, § 1; 1979, No. 898, § 6; A.S.A. 1947, § 82-2606.

A.C.R.C. Notes. Acts 1987, No. 52, § 1, provided that dronabinol is a sched-

ule II drug instead of a schedule VI drug when it is in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the U.S. Food and Drug Administration for medical treatment.

CASE NOTES

ANALYSIS

Cocaine.

Delegation of authority.

Cocaine.

Cocaine is defined as a "narcotic drug" under § 5-64-101(o)(2)(D) and is made a Schedule II controlled substance under the terms of a board regulation adopted in accordance with this section. *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988).

Delegation of Authority.

This section, allowing the Commissioner to determine what particular substances should be placed in Schedule II, does not constitute an unlawful delegation of legislative authority to the Commissioner. *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

Cited: *Arkansas State Medical Bd. v. Elliott*, 263 Ark. 86, 563 S.W.2d 427 (1978).

5-64-206. [Reserved.]

Publisher's Notes. The Uniform Controlled Substance Act (U.L.A.), § 206, lists the controlled substances included in Schedule II. Schedule II was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and republished annually by the Director

of the Division of Health of the Department of Health and Human Services or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

5-64-207. Criteria for Schedule III.

The Director of the Division of Health of the Department of Health and Humans Services shall place a substance in Schedule III if he or she finds that:

(1) The substance has a potential for abuse less than the substances listed in Schedules I and II;

(2) The substance has currently accepted medical use in treatment in the United States; and

(3) Abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

History. Acts 1971, No. 590, Art. 2, § 7; 1973, No. 186, § 1; 1979, No. 898, § 7; A.S.A. 1947, § 82-2608.

CASE NOTES

Cited: *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

5-64-208. [Reserved.]

Publisher's Notes. The Uniform Controlled Substance Act (U.L.A.), § 208, lists the controlled substances included in Schedule III. Schedule III was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and republished annually by the Director

of the Division of Health of the Department of Health and Human Services or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

5-64-209. Criteria for Schedule IV.

The Director of the Division of Health of the Department of Health and Human Services shall place a substance in Schedule IV if he or she finds that:

- (1) The substance has a low potential for abuse relative to substances in Schedule III;
- (2) The substance has currently accepted medical use in treatment in the United States; and
- (3) Abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule III.

History. Acts 1971, No. 590, Art. 2, § 9; 1973, No. 186, § 1; 1979, No. 898, § 9; A.S.A. 1947, § 82-2610.

CASE NOTES

Cited: *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983).

5-64-210. [Reserved.]

Publisher's Notes. The Uniform Controlled Substance Act (U.L.A.), § 210, lists the controlled substances included in Schedule IV. Schedule IV was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and republished annually by the Director

of the Division of Health of the Department of Health and Human Services or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

5-64-211. Criteria for Schedule V.

The Director of the Division of Health of the Department of Health and Human Services shall place a substance in Schedule V if he or she finds that:

- (1) The substance has low potential for abuse relative to the controlled substances listed in Schedule IV;
- (2) The substance has currently accepted medical use in treatment in the United States; and

(3) The substance has limited physical dependence or psychological dependence liability relative to the controlled substances listed in Schedule IV.

History. Acts 1971, No. 590, Art. 2, § 11; 1973, No. 186, § 1; 1979, No. 898, § 11; A.S.A. 1947, § 82-2612.

CASE NOTES

Cited: *Miller v. State*, 253 Ark. 1060, 490 S.W.2d 445 (1973).

5-64-212. Substances in Schedule V.

(a) An ephedrine combination product, pseudoephedrine, and phenylpropanolamine, as defined in § 5-64-1103(g), are designated Schedule V controlled substances in addition to the drugs and other substances listed in Schedule V of the List of Controlled Substances for the State of Arkansas promulgated by the Director of the Division of Health of the Department of Health and Human Services.

(b) The Schedule V classification does not apply to:

(1) An exempt product described in § 5-64-1103(b)(1);

(2) Any ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form described in § 5-64-1103(b)(2); or

(3)(A) A product that is dispensed pursuant to a valid prescription that is not restricted to five (5) refills within a six (6) month period.

(B) A product described in subdivision (b)(3)(A) of this section is regulated in the same manner as any nonscheduled prescription drug and shall be kept in a container that is supplied by the pharmacy and labeled in a manner consistent with any other prescription.

(c) The director may reschedule a product described in subdivision (b)(1) or (b)(2) of this section if it is determined that the conversion of the active ingredient in the product into methamphetamine or its salts or precursors is feasible.

(d) A wholesale distributor with exclusive rights to distribute pseudoephedrine to only licensed pharmacies is exempt from Schedule V requirements for the storage and distribution of pseudoephedrine.

History. Acts 2005, No. 256, § 2.

A.C.R.C. Notes. Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of metham-

phetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

Publisher's Notes. The Uniform Controlled Substance Act (U.L.A.), § 212, lists the controlled substances included in

Schedule V. Schedule V was originally adopted in Arkansas but was subsequently repealed and is now governed by this section and administrative regulation. It is revised and republished annually by the Director of the Division of

Health of the Department of Health and Human Services or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

5-64-213. Schedule VI established.

(a) There is established a Schedule VI for the classification of those substances that are determined to be inappropriately classified by placing them in Schedules I through V.

(b) Schedule VI includes a controlled substance listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.

History. Acts 1971, No. 590, Art. 2, § 13, as added by Acts 1973, No. 186, § 1; A.S.A. 1947, § 82-2614.

CASE NOTES

Cited: *Baughman v. State*, 265 Ark. 869, 582 S.W.2d 4 (1979).

5-64-214. Criteria for Schedule VI.

The Director of the Division of Health of the Department of Health and Human Services shall place a substance in Schedule VI if he or she finds that:

- (1) The substance is not currently accepted for medical use in treatment in the United States;
- (2) That there is lack of accepted safety for use of the drug or other substance even under direct medical supervision;
- (3) That the substance has relatively high psychological and/or physiological dependence liability; and
- (4) That use of the substance presents a definite risk to public health.

History. Acts 1971, No. 590, Art. 2, 1979, No. 898, § 12; A.S.A. 1947, § 82-§ 14, as added by Acts 1973, No. 186, § 1; 2614.1.

5-64-215. Substances in Schedule VI.

(a) Any material, compound, mixture, or preparation, whether produced directly or indirectly from a substance of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, that contains any quantity of the following substances, or that contains any of their salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation, are included in Schedule VI:

- (1) Marijuana;
- (2) Tetrahydrocannabinols; and

(3) A synthetic equivalent of the substance contained in the plant, or in the resinous extractives of cannabis, sp., and/or a synthetic substance, derivative, or its isomers with similar chemical structure and pharmacological activity such as the following:

(A) ☐ 1 cis or trans tetrahydrocannabinol, and its optical isomers;

(B) ☐ 6 cis or trans tetrahydrocannabinol, and its optical isomers; and

(C) ☐ 3.4 cis or trans tetrahydrocannabinol, and its optical isomers.

(b) However, the Director of the Division of Health of the Department of Health and Human Services shall not delete a controlled substance listed in this section from Schedule VI.

History. Acts 1971, No. 590, Art. 2, § 15, as added by Acts 1973, No. 186, § 1; 1979, No. 898, § 22; A.S.A. 1947, § 82-2614.2; Acts 1999, No. 1534, § 1; 2001, No. 320, § 3.

A.C.R.C. Notes. Acts 1987, No. 52, § 1, provided that dronabinol is a schedule II drug instead of a schedule VI drug when it is in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the U.S. Food and Drug Administration for medical treatment.

Acts 2001, No. 320, § 1, provided:

“(a) Gamma-hydroxybutyrate (‘GHB’) was not scheduled as a controlled substance by the Federal Drug Enforcement Administration or by the Director of the Arkansas Department of Health prior to 1999. Concerned about the potential for the substance’s abuse, the Eighty-second General Assembly designated GHB as a Schedule VI controlled substance.

“(b) Subsequently, the Drug Enforcement Administration classified GHB as a

Schedule I. In addition, the final rule of the Drug Enforcement Administration places Food and Drug Administration approved products containing GHB into Schedule III, if or when they are approved.

“(c) Since the legislature classified GHB as a schedule VI substance, the Director was precluded from scheduling GHB in a manner consistent with the scheduling designated by the Drug Enforcement Administration. As a result, criminal sanctions for the possession with the intent to deliver GHB are not as severe as other substances possessing similar harmful and abusive characteristics.

“(d) It is the purpose of this act to allow the director to adopt the Drug Enforcement Administration’s scheduling of GHB pursuant to Arkansas Code 5-64-201.”

Amendments. The 2001 amendment deleted former (b) and (d) and redesignated the remaining subsections accordingly.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

Cited: *Hock v. State*, 259 Ark. 67, 531 S.W.2d 701 (1976); *White v. State*, 260 Ark. 361, 538 S.W.2d 550 (1976); *Gatlin v. State*, 262 Ark. 485, 559 S.W.2d 12 (1977);

United States v. Heater, 689 F.2d 783 (8th Cir. 1982); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985).

5-64-216. Schedule revisions.

The Director of the Division of Health of the Department of Health and Human Services shall revise and republish the schedules annually.

History. Acts 1971, No. 590, Art. 2, 1979, No. 898, § 13; A.S.A. 1947, § 82-§ 16, as added by Acts 1973, No. 186, § 1; 2614.3.

RESEARCH REFERENCES

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

CASE NOTES

Failure to Revise.

The commissioner's (now director's) failure to revise and republish the schedules of controlled substances, at least where no allegation of the lack of actual notice was made, could not be used as a defense to a criminal prosecution under a part of the act as passed by the General Assembly. *Bushong v. State*, 267 Ark. 113,

589 S.W.2d 559 (1979), cert. denied, 446 U.S. 938, 100 S. Ct. 2157, 64 L. Ed. 2d 791 (1980).

Cited: *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982); *Curry v. State*, 279 Ark. 153, 649 S.W.2d 833 (1983); *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

SUBCHAPTER 3 — UNIFORM CONTROLLED SUBSTANCES ACT — REGULATION OF DISTRIBUTION

SECTION.

5-64-301 — 5-64-304. [Reserved.]
5-64-305. Powers of Arkansas State Board of Pharmacy — Sale of nonnarcotic drugs.

SECTION.

5-64-306. Offenses relating to records.
5-64-307. Order forms.
5-64-308. Written prescriptions.

Publisher's Notes. Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or

her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

CASE NOTES

Cited: *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

5-64-301 — 5-64-304. [Reserved.]

Publisher's Notes. Sections 301-304 of the Uniform Controlled Substances Act (U.L.A.) were not adopted in Arkansas. Those sections related to registration of

persons who manufacture, distribute, or dispense controlled substances within the state.

5-64-305. Powers of Arkansas State Board of Pharmacy — Sale of nonnarcotic drugs.

(a)(1) Nothing contained in this chapter shall affect the licensing or regulation of pharmacists or pharmacies in this state by the Arkansas State Board of Pharmacy.

(2) The board may also inventory and destroy any outdated or unwanted controlled substance at the request of a licensee of the board with proper record of the destruction provided to appropriate agencies.

(3) The board is given primary but not exclusive jurisdiction in the enforcement application of this chapter to the board's licensees.

(b) Nothing in this chapter is deemed to prohibit the sale of a nonnarcotic proprietary drug if the nonnarcotic proprietary drug, under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or the Food, Drug, and Cosmetic Act, § 20-56-201 et seq., may be lawfully sold over the counter without a prescription.

History. Acts 2005, No. 1994, designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections

5-64-306. Offenses relating to records.

It is unlawful for any person to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter.

History. Acts 2005, No. 1994, designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections

5-64-307. Order forms.

(a) A controlled substance in Schedule I or Schedule II shall be distributed by a practitioner to another practitioner only pursuant to an order form.

(b) Compliance with the provisions of federal law respecting an order form is deemed compliance with this section.

History. Acts 1971, No. 590, Art. 3, § 1; A.S.A. 1947, § 82-2615.

5-64-308. Written prescriptions.

(a) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in Schedule II may be dispensed without the written prescription of a practitioner.

(b)(1) In an emergency situation, as defined by rule of the Director of the Division of Health of the Department of Health and Human Services, a Schedule II drug may be dispensed upon oral prescription of a practitioner, reduced promptly to writing, and filed by the pharmacy.

(2) The prescription shall be retained in conformity with the requirements of section 6 of this subchapter.

(3) No prescription for a Schedule II substance may be refilled.

(c)(1) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in Schedule III or Schedule IV that is a prescription drug shall not be dispensed without a written or oral prescription of a practitioner.

(2) The prescription shall not be filled or refilled more than six (6) months after the date of the prescription or be refilled more than five (5) times, unless renewed by the practitioner.

(d) A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medical purpose.

History. Acts 1971, No. 590, Art. 3, § 2; A.S.A. 1947, § 82-2616.

Publisher's Notes. The reference in subsection (b) to "section 6 of this subchapter" refers to § 306 of the Uniform

Controlled Substances Act, which was not adopted in Arkansas. That section related to the registration of persons who manufacture, distribute, or dispense controlled substances within the state.

CASE NOTES

Cited: Hales v. State, 299 Ark. 93, 771 S.W.2d 285 (1989).

SUBCHAPTER 4 — UNIFORM CONTROLLED SUBSTANCES ACT — PROHIBITIONS AND PENALTIES**SECTION.**

- 5-64-401. Criminal penalties.
- 5-64-402. Offenses relating to records, maintaining premises, etc.
- 5-64-403. Fraud — Criminal penalties — Drug Paraphernalia.
- 5-64-404. Use of a communication device.
- 5-64-405. Continuing criminal enterprise.
- 5-64-406. Distribution to minors — Enhanced penalties.
- 5-64-407. Manufacture of methamphetamine in the presence of minors — Enhanced penalties.
- 5-64-408. Subsequent convictions — Enhanced penalties.

SECTION.

- 5-64-409. [Repealed.]
- 5-64-410. Penalties for delivery — Enhanced penalties.
- 5-64-411. Proximity to certain facilities — Enhanced penalties.
- 5-64-412. Violations by public officials or law enforcement officers — Enhanced penalties.
- 5-64-413. Probation — Discharge and dismissal.
- 5-64-414. Controlled substance analog.
- 5-64-415. Drug precursors.
- 5-64-416. [Repealed.]
- 5-64-417. Penalties under other laws.
- 5-64-418. Foreign conviction.

A.C.R.C. Notes. Amendments to this subchapter by Acts 2005, No. 1994, caused a substantial rewriting of this subchapter, including the repeal of provisions from sections and the transfer of those provisions or similar provisions to a different section.

Publisher's Notes. Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

For Comments regarding the Uniform Controlled Substances Act, see Commentaries Volume B.

Effective Dates. Acts 1972 (Ex. Sess.), No. 67, § 9: Mar. 6, 1972. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971; that the penalties prescribed in Act 590 are in need of clarification; that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1972 (Ex. Sess.), No. 68, § 4: Mar. 6, 1972. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971; that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public

health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 305, § 4: Mar. 3, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971 upon the possession of marijuana and the penalty therefor; that the problem of drug abuse in this state is increasing at an alarming rate and that additional provisions are needed to assist in enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1225, § 2: Feb. 12, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971 upon the manufacture, distribution, and dispensing of controlled substances and the penalty therefor; that existing provisions require deletion for clarification and for assistance in enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and, therefore, should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 78, § 7: became law without Governor's signature, Feb. 15, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an increasing problem of drug abuse in the State of Arkansas and that in order to protect the

public health and safety immediate steps must be taken to enact a comprehensive Drug Paraphernalia Act and the immediate passage of this Act is necessary to accomplish this purpose; therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force from and after its passage and approval."

Acts 1981, No. 117, § 3: Feb. 19, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that theft of a controlled substance from a controlled premises should be included within the criminal penalties section of the Controlled Substances Act, and that this Act is immediately necessary to accomplish the same and thereby provide for the more effective and efficient enforcement of the Controlled Substances Act. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 306, § 3: Mar. 2, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590, as amended, particularly with respect to those controlled substances classified in schedules I and II and which are narcotic drugs; furthermore, it is hereby found and determined by the General Assembly that the problem of manufacturing, delivering, or possessing with intent to manufacture or deliver, those controlled substances classified in schedule VI is increasing at an alarming rate, both in terms of occurrence and quantity, and that additional provisions are needed to assist in the enforcement of the provisions of Act 590, as amended, particularly with respect to those substances classified in Schedule VI. This Act is immediately necessary to provide such enforcement assistance for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in

full force and effect from and after its passage and approval."

Acts 1983, No. 417, § 3: Mar. 13, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590, as amended, particularly with respect to those controlled substances classified in schedules I and II and which are narcotic drugs, furthermore, it is hereby found and determined by the General Assembly that the problem of manufacturing, delivering, or possessing with intent to manufacture or deliver, those controlled substances classified in schedule VI is increasing at an alarming rate, both in terms of occurrence and quantity, and that additional provisions are needed to assist in the enforcement of the provisions of Act 590, as amended, particularly with respect to those substances classified in Schedule VI. This Act is immediately necessary to provide such enforcement assistance for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 787, § 10: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an increasing problem of counterfeit substances in the State of Arkansas and that in order to protect the public health and safety, immediate steps must be taken to establish a system of punishment for those possessing or distributing such substances. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1987, No. 1013, § 3: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1225 of the Extended Session of 1976; that this Act is a

reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1994 (2nd Ex. Sess.), Nos. 10 and 46, § 5: Aug. 22, 1994 and Aug. 25, 1994, respectively. Emergency clause provided: “It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that the felony classifications for distribution or manufacture of Schedule VI controlled substances are not sufficiently different for large and small amounts of the controlled substance. It is necessary that the consequences for inchoate offenses related to manufacturing or selling larger amounts of Schedule VI controlled substances be immediately increased. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full

force and effect from and after its passage and approval.”

Acts 1999, No. 1268, § 11: Apr. 9, 1999. Emergency clause provided: “It is found and determined by the General Assembly that the illegal use of the drug methamphetamine has become a serious problem in this State; that, because the drug is relatively easy to make, many illegal methamphetamine labs are operating in the state; that this act increases penalties for drug paraphernalia used to manufacture methamphetamine; and that this act is immediately necessary to combat illegal drug production and use in this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law,
Criminal Law, 1 UALR L.J. 153.
Barrier, Render Unto Caesar: An Essay

on Private Morals and Public Law, 4
UALR L.J. 511.

CASE NOTES

Cited: Barrington v. Norris, 49 F.3d 440
(8th Cir. 1995); Warren v. State, 59 Ark.
App. 155, 954 S.W.2d 298 (1997); Bragg v.
State, 328 Ark. 613, 946 S.W.2d 654

(1997); Bradford v. State, 328 Ark. 701,
947 S.W.2d 1 (1997); McGhee v. State, 330
Ark. 38, 954 S.W.2d 206 (1997); Burris v.
State, 330 Ark. 66, 954 S.W.2d 209 (1997).

5-64-401. Criminal penalties.

- (a) CONTROLLED SUBSTANCE — MANUFACTURING, DELIVERING, OR POSSESSING WITH INTENT TO MANUFACTURE OR DELIVER. Except as authorized by subchapters 1-6 of this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. Any person who violates this subsection with respect to:
- (1) SCHEDULE I OR II NARCOTIC DRUG OR METHAMPHETAMINE.
 - (A)(i) A controlled substance classified in Schedule I or Schedule II that is a narcotic drug or methamphetamine, and by aggregate

weight, including an adulterant or diluent, is less than twenty-eight grams (28 g), is guilty of a felony and shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding twenty-five thousand dollars (\$25,000).

(ii) For any purpose other than disposition, this offense is a Class Y felony.

(B)(i) A controlled substance classified in Schedule I or Schedule II that is a narcotic drug or methamphetamine, and by aggregate weight, including an adulterant or diluent, is twenty-eight grams (28 g) or more but less than two hundred grams (200 g), is guilty of a felony and shall be imprisoned for not less than fifteen (15) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding fifty thousand dollars (\$50,000).

(ii) For any purpose other than disposition, this offense is a Class Y felony.

(C)(i) A controlled substance classified in Schedule I or Schedule II that is a narcotic drug or methamphetamine, and by aggregate weight, including an adulterant or diluent, is two hundred grams (200 g) or more but less than four hundred grams (400 g), is guilty of a felony and shall be imprisoned for not less than twenty (20) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding one hundred thousand dollars (\$100,000).

(ii) For any purpose other than disposition, this offense is a Class Y felony.

(D)(i) A controlled substance classified in Schedule I or Schedule II that is a narcotic drug or methamphetamine, and by aggregate weight, including an adulterant or diluent, is four hundred grams (400 g) or more, is guilty of a felony and shall be imprisoned for not less than forty (40) years, or life, and shall be fined an amount not exceeding two hundred and fifty thousand dollars (\$250,000).

(ii) For any purpose other than disposition, this offense is a Class Y felony;

(2) OTHER SCHEDULE I, II, OR III.

(A)(i) Any other controlled substance classified in Schedule I, Schedule II, or Schedule III that by aggregate weight, including an adulterant or diluent, is less than twenty-eight grams (28 g), is guilty of a felony and shall be imprisoned for not less than five (5) years nor more than twenty (20) years and shall be fined an amount not to exceed fifteen thousand dollars (\$15,000).

(ii) For any purpose other than disposition, this offense is a Class B felony.

(B)(i) Any other controlled substance classified in Schedule I, Schedule II, or Schedule III that by aggregate weight, including an adulterant or diluent, is twenty-eight grams (28 g) or more but less than four hundred grams (400 g), is guilty of a felony and shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life, and shall be fined an amount not to exceed fifty thousand dollars (\$50,000).

(C)(i) Any other controlled substance classified in Schedule I, Schedule II, or Schedule III that by aggregate weight, including an adulterant or diluent, is four hundred grams (400 g) or more, is guilty of a felony and shall be imprisoned for not less than fifteen (15) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding one hundred thousand dollars (\$100,000).

(ii) For any purpose other than disposition, this offense is a Class B felony;

(3) SCHEDULE IV OR V.

(A)(i) A substance classified in Schedule IV or Schedule V that by aggregate weight, including an adulterant or diluent, is less than two hundred grams (200 g), is guilty of a felony and shall be imprisoned for not less than three (3) years nor more than ten (10) years and shall be fined an amount not exceeding ten thousand dollars (\$10,000).

(ii) For any purpose other than disposition, this offense is a Class C felony.

(B)(i) A substance classified in Schedule IV or Schedule V that by aggregate weight, including an adulterant or diluent, is two hundred grams (200 g) or more but less than four hundred grams (400 g), is guilty of a felony and shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding fifty thousand dollars (\$50,000).

(ii) For any purpose other than disposition, this offense is a Class C felony.

(C)(i) A substance classified in Schedule IV or Schedule V that by aggregate weight, including an adulterant or diluent, is four hundred grams (400 g) or more, is guilty of a felony and shall be imprisoned for not less than fifteen (15) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding one hundred thousand dollars (\$100,000).

(ii) For any purpose other than disposition, this offense is a Class C felony; and

(4) SCHEDULE VI. A controlled substance classified in Schedule VI is guilty of a felony and shall be:

(A)(i) Imprisoned no less than four (4) nor more than ten (10) years and/or fined no more than twenty-five thousand dollars (\$25,000) if the quantity of the controlled substance is less than ten pounds (10 lbs.).

(ii) For any purpose other than disposition, this offense is a Class C felony;

(B)(i) Imprisoned for no less than five (5) years nor more than twenty (20) years and/or fined no less than fifteen thousand dollars (\$15,000) nor more than fifty thousand dollars (\$50,000) if the quantity of the controlled substance substance is ten pounds (10 lbs.) or more but less than one hundred pounds (100 lbs.).

(ii) For any purpose other than disposition, this offense is a Class B felony; or

(C)(i) Imprisoned for no less than six (6) years nor more than thirty (30) years and/or fined no less than fifteen thousand dollars (\$15,000) nor more than one hundred thousand dollars (\$100,000) if the quantity of the controlled substance is one hundred pounds (100 lbs.) or more.

(ii) For any purpose other than disposition, this offense is a Class A felony.

(b) COUNTERFEIT SUBSTANCE — REBUTTABLE PRESUMPTION.

(1) Except as authorized by this chapter, it is unlawful for any person to create, deliver, or possess with intent to deliver a counterfeit substance.

(2) For purposes of this subsection, possession of one hundred (100) dosage units of any one (1) counterfeit substance or possession of two hundred (200) dosage units of counterfeit substances regardless of the type creates a rebuttable presumption that the person possesses the counterfeit substance with intent to deliver.

(3) Any person who violates this subsection with respect to:

(A) A counterfeit substance purporting to be a controlled substance classified in Schedule I or Schedule II that is a narcotic drug or methamphetamine, is guilty of a Class B felony;

(B) Any other counterfeit substance purporting to be a controlled substance classified in Schedule I, Schedule II, or Schedule III is guilty of a Class C felony;

(C) A counterfeit substance purporting to be a controlled substance classified in Schedule IV is guilty of a Class C felony;

(D) A counterfeit substance purporting to be a controlled substance classified in Schedule V is guilty of a Class C felony; and

(E) A counterfeit substance purporting to be a controlled substance that is not classified as a scheduled controlled substance is guilty of a Class D felony.

(c) POSSESSION OF COUNTERFEIT OR CONTROLLED SUBSTANCE.

(1) It is unlawful for any person to possess a controlled substance or counterfeit substance unless the controlled substance or counterfeit substance was obtained:

(A) Directly from or pursuant to a valid prescription or an order of a practitioner while acting in the course of his or her professional practice; or

(B) As otherwise authorized by this chapter.

(2) Any person who violates this subsection with respect to:

(A) A controlled substance classified in Schedule I or Schedule II is guilty of a Class C felony;

(B) Any other controlled substance, first offense, is guilty of a Class A misdemeanor;

(C) Any other controlled substance, second offense, is guilty of a Class D felony; and

(D) Any other controlled substance, third or subsequent offense, is guilty of a Class C felony.

(d) REBUTTABLE PRESUMPTION OF INTENT TO DELIVER.

(1) Possession by any person of a quantity of any controlled substance including the mixture or substance listed in subdivision (d)(3) of this section in excess of the quantity limit set out in subdivision (d)(3) of this section creates a rebuttable presumption that the person possesses the controlled substance with intent to deliver.

(2) The presumption may be overcome by the submission of evidence sufficient to create a reasonable doubt that the person charged possessed the controlled substance with intent to deliver.

(3)(A) List of controlled substances and quantities:

- (i) Cocaine — one gram (1 g);
- (ii) Codeine — three hundred milligrams (300 mg);
- (iii) Hashish — six grams (6 g);
- (iv) Heroin — one hundred milligrams (100 mg);
- (v) Hydromorphone Hydrochloride — sixteen milligrams (16 mg);
- (vi) Lysergic Acid Diethylamide (LSD) — one hundred micrograms (100 g);
- (vii) Marijuana — one ounce (1 oz.);
- (viii) Methadone — one hundred milligrams (100 mg);
- (ix) Methamphetamine — two hundred milligrams (200 mg);
- (x) Morphine — three hundred milligrams (300 mg);
- (xi) Opium — three grams (3 g); and
- (xii) Pethidine — three hundred milligrams (300 mg).

(B) For a controlled substance other than those listed in subdivision (d)(3)(A) of this section:

- (i) Depressant drug — twenty (20) hypnotic dosage units;
- (ii) Hallucinogenic drug — ten (10) dosage units; and
- (iii) Stimulant drug — two hundred milligrams (200 mg).

(e) IMMUNITY FOR PRACTITIONER. No civil or criminal liability shall be imposed by virtue of this chapter on any practitioner who manufactures, distributes, or possesses a counterfeit substance for use by a registered practitioner in the course of professional practice or research or for use as a placebo by a registered practitioner in the course of professional practice or research.

(f) POSSESSION IN DETENTION FACILITY — ENHANCED PENALTIES. When any person is convicted of the unlawful possession of a controlled substance in any state criminal detention facility, county criminal detention facility, or city criminal detention facility, or any juvenile detention facility, the penalty for the offense is increased to the next higher classification of felony or misdemeanor as prescribed by law for the offense.

(g) REBUTTABLE PRESUMPTION ON ATTEMPT TO MANUFACTURE METHAMPHETAMINE.

(1) Simultaneous possession by any person of drug paraphernalia and a drug precursor appropriate for use to manufacture methamphetamine or possession by any person of drug paraphernalia appropriate for use to manufacture methamphetamine that tests positive for methamphetamine residue creates a rebuttable presumption that the person has engaged in conduct that constitutes a substantial step in a

course of conduct intended to result in the manufacture of methamphetamine in violation of § 5-3-201, conduct constituting attempt and this section.

(2) The presumption may be overcome by the submission of evidence sufficient to create a reasonable doubt that the person charged attempted to manufacture methamphetamine.

(h) **CLEAN UP LIABILITY — RESTITUTION.**

(1) A person who violates this section is liable for the cost of the cleanup of the site where the person:

(A) Manufactured a controlled substance; or

(B) Possessed drug paraphernalia or a chemical for the purpose of manufacturing a controlled substance.

(2) The person shall make restitution to the state or local agency responsible for the cleanup for the cost of the cleanup under § 5-4-205.

History. Acts 1971, No. 590, Art. 4, § 1; 1972 (Ex. Sess.), No. 67, § 1; 1972 (Ex. Sess.), No. 68, § 1; 1973, No. 186, §§ 2, 3; 1975, No. 305, § 2; 1977, No. 557, § 1; 1983, No. 306, § 1; 1983, No. 417, § 1; 1983, No. 787, §§ 3-5; 1985, No. 165, § 1; 1985, No. 472, § 1; 1985, No. 512, § 1; 1985, No. 669, § 1; A.S.A. 1947, § 82-2617; Acts 1989 (3rd Ex. Sess.), No. 82, §§ 1, 2; 1994 (2nd Ex. Sess.), No. 10, § 1; 1994 (2nd Ex. Sess.), No. 46, § 1; 1997, No. 1142, § 1; 1999, No. 1268, § 2; 2001, No. 753, § 1; 2003, No. 1336, § 2; 2005, No. 1994, § 305[B].

A.C.R.C. Notes. Acts 1999, No. 1268, § 1, provided: "This act shall be known as the 'Arkansas Methamphetamine Lab Act of 1999'."

Acts 1999, No. 1268, § 7, provided: "The Arkansas Sentencing Commission shall report to the General Assembly regarding the impact of this act and shall make recommendations deemed appropriate as to the continuance of its provisions."

Amendments. The 2001 amendment added (h).

The 2003 amendment substituted "The person ... under § 5-4-205" for "The person shall be liable to the state or local agency that was responsible for the site cleanup" in (h)(2).

The 2005 amendment inserted the present subdivision designations and headings; deleted "subchapters 1-6 of" preceding "this chapter" in the first sentence of (b) and in (e); deleted "in violation of subsections (a) and (b) of this section" following "intent to deliver" in the second sentence of (b) and twice in (d); inserted "or methamphetamine" in present (b)(1); in (c), deleted the former second and third sentence and rewrote the last sentence; added (c)(1)-(4); substituted "The presumption" for "Provided, however, the presumption provided for herein" in (d) and (g); and, in the list of controlled substances in (d), moved "Lysergic Acid Diethylamide (LSD) — 100 micrograms" from the end position to second position on the list, and inserted "Methamphetamine — 200 milligrams."

Cross References. Expungement of record, § 16-90-1201.

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

Legislative Survey, Criminal Law, 8 UALR L.J. 559.

Arkansas Law Survey, Antley, Criminal Law, 9 UALR L.J. 119.

Survey, Criminal Law, 13 UALR L.J. 341.

Notes, Criminal Law — Controlled Substances — Arkansas Adopts the Useable Amount Standard. Harbison v. State, 302 Ark. 315, 790 S.W.2d 146 (1990), 13 UALR L.J. 583.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

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Constitutionality.

The statutory presumption that possession of more than 100 milligrams of heroin is possession with intent to deliver does not unconstitutionally deny due process or deprive the accused of the privilege against self-incrimination because there is a rational connection between fact proved and fact presumed; existence of presumed fact is not so untenable as to make the statute arbitrary, and the accused is not prevented from presenting his defense to the presumed fact. *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973).

This section does not conflict with Ark. Const., Art. 7, § 23 on its face because there is no requirement that the jury be instructed as to the effect of proving pos-

session of more than 100 milligrams of heroin. *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973).

Subsection (d) of this section is constitutional. *Hooper v. State*, 257 Ark. 103, 514 S.W.2d 394 (1974).

Statutory presumption of guilt for possession of heroin with intent to deliver if held in given amount or more was valid, for petitioner failed to establish that the presumption authorized by the act was irrational or arbitrary and therefore unconstitutional. *Stone v. Lockhart*, 414 F. Supp. 1180 (E.D. Ark. 1976).

The imposition of sentence of life imprisonment for delivery of less than one-quarter gram of cocaine base, which was the defendant's first offense, constituted cruel and unusual punishment under the Eighth Amendment to the federal constitution. *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001).

Felony Classification.

Inmate's petition for a writ of mandamus filed against officials of the Department of Corrections, in which he contended that the Department improperly classified him as a third offender for parole-eligibility purposes, was properly denied as the record was insufficient for the appellate court to determine whether a 1989 conviction for possession of crack cocaine fell under subsection (a) or (c) of this section and, thus, the felony classification for the conviction; furthermore, the precise subsection under which inmate was convicted was a critical component in determining his status under § 16-93-606. *Robertson v. Norris*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 96 (Feb. 10, 2005).

Purpose.

The legislature enacted this section to upgrade the penalties for offenses which were already felonies, and the legislature intended no change in the felony status of those offenses. *Osgood v. State*, 289 Ark. 65, 709 S.W.2d 401 (1986).

The intent of legislation prohibiting possession of a controlled substance is to prevent use of and trafficking in controlled substances and possession of less than a usable amount of controlled substance is not what legislators have in mind when

they criminalize possession because it cannot prevent conduct at which the legislation is aimed, that is, use of or trafficking in drugs. *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990).

Bond.

Because the appellate court affirmed the trial court's judgment convicting defendant of possession of drug paraphernalia with intent to manufacture and possession of a controlled substance, defendant's issue of bail pending appeal became moot and the appellate court did not have to decide moot issues; the appropriate and meaningful action that defendant could have taken would have been to petition the appellate court for a writ of certiorari separately challenging the trial court's denial of an appeal bond. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Cocaine.

Cocaine is a Schedule II controlled substance. *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986).

It is unnecessary for the state to offer evidence to the trial court, sitting without a jury, that cocaine is listed by the health department as a Schedule II controlled substance or that cocaine is classified by the legislature as a narcotic drug. *Lively v. State*, 25 Ark. App. 198, 755 S.W.2d 238 (1988).

Counterfeit Substances.

Failure to prove that the substance in question is a noncontrolled substance is fatal to a prosecution for violation of subsection (b). *Shaw v. State*, 65 Ark. App. 186, 986 S.W.2d 129 (1999).

State's failure to prove that a substance was a statutorily-defined "counterfeit substance" was fatal to defendant's criminal conviction for possession of a counterfeit substance with the intent to deliver, especially where there was no evidence of attempted delivery; the only factor that the state proved was that the physical appearance of the finished product containing the noncontrolled substance was substantially the same as that of a specific controlled substance. *Jackson v. State*, 86 Ark. App. 145, 165 S.W.3d 467 (2004).

Defenses.

Instruction that defendant was not relieved of criminal responsibility for the possession of controlled substances simply

because he was intoxicated at the time the contraband was found in his possession held appropriate since the jury could find that the defendant was not in possession of the controlled substances and was, because of his intoxication, unaware of the presence of the substances. *Baughman v. State*, 265 Ark. 869, 582 S.W.2d 4 (1979).

Delivery.

—In General.

Evidence held sufficient to sustain conviction for delivery of controlled substance. *Miller v. State*, 253 Ark. 1060, 490 S.W.2d 445 (1973); *Crain v. State*, 268 Ark. 656, 594 S.W.2d 863 (Ct. App. 1980); *Womack v. State*, 301 Ark. 193, 783 S.W.2d 33 (1990); *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

Prescription of a controlled substance by a licensed physician is not "delivery" of a controlled substance. *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

Undercover officer's testimony of her drug buys from the defendant was sufficient to establish that defendant delivered controlled and counterfeit substances in violation of this section. *Bennett v. State*, 307 Ark. 400, 821 S.W.2d 13 (1991).

This section prohibits the "delivery" of a controlled substance, not its sale. *Higgs v. State*, 313 Ark. 272, 854 S.W.2d 328 (1993).

Although a third person ultimately took the money, defendant could be guilty of "delivery" of a controlled substance, as one does not have to receive money to be guilty of delivery of a controlled substance. *Higgs v. State*, 313 Ark. 272, 854 S.W.2d 328 (1993).

—Intent.

Evidence held sufficient to convict defendant of possession of controlled substance with intent to deliver. *Smith v. State*, 258 Ark. 601, 528 S.W.2d 389 (1975), cert. denied, 425 U.S. 912, 96 S. Ct. 1508, 47 L. Ed. 2d 762 (1976); *Milburn v. State*, 260 Ark. 553, 542 S.W.2d 490 (1976), aff'd, 262 Ark. 267, 555 S.W.2d 946 (1977); *Byars v. State*, 259 Ark. 158, 533 S.W.2d 175 (1976); *Lewis v. State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982); *Johnson v. State*, 306 Ark. 399, 814 S.W.2d 908 (1991); *Johnson v. State*, 35 Ark. App. 143, 814 S.W.2d 915 (1991); *Igwe v. State*, 312 Ark. 220, 849 S.W.2d 462 (1993).

Evidence held sufficient for trial court to

submit the question of defendant's intent to deliver to the jury. *Jackson v. State*, 259 Ark. 780, 536 S.W.2d 716 (1976).

The court correctly instructed the jury that the quantity of controlled substance possessed was evidence to be considered along with all the other facts and circumstances in the case in determining the intent with which the controlled substance was possessed. *Milburn v. State*, 260 Ark. 553, 542 S.W.2d 490 (1976), *aff'd*, 262 Ark. 267, 555 S.W.2d 946 (1977); *Akins v. State*, 264 Ark. 376, 572 S.W.2d 140 (1978); *Brenneman v. State*, 264 Ark. 460, 573 S.W.2d 47 (1978), *cert. denied*, 442 U.S. 931, 99 S. Ct. 2863, 61 L. Ed. 2d 299 (1979); *Johnson v. State*, 6 Ark. App. 78, 638 S.W.2d 686 (1982).

Where defendant had possessed less than the minimum amount that would support an inference of intent to deliver, it was error for the trial court to refuse to instruct the jury that it could not infer that the defendant intended to deliver the controlled substance solely upon the basis of the quantity in his possession. *Rowland v. State*, 262 Ark. 783, 561 S.W.2d 304 (1978).

State must prove that accused possessed a specified quantity of a particular drug with an intent to deliver that drug. *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978).

Evidence held insufficient to support conviction of possession with the intent to deliver a controlled substance. *Berry v. State*, 263 Ark. 446, 565 S.W.2d 418 (1978); *Pace v. State*, 267 Ark. 610, 593 S.W.2d 20 (1980); *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982); *Booth v. State*, 10 Ark. App. 216, 662 S.W.2d 213 (1984); *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

Where the state proved actual delivery there could be no question about the defendant's intent. *Moser v. State*, 266 Ark. 200, 583 S.W.2d 15 (1979).

In prosecution for possession of heroin with intent to deliver, the trial judge did not err in refusing to instruct the jury on the meaning of intent. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979).

Conviction for trafficking upheld where less than the presumptive amount was found in the possession of the accused, but where other proof of intent to deliver was present. *Conley v. State*, 308 Ark. 70, 821 S.W.2d 783 (1992).

Where defendant possessed 3.45 grams of cocaine, the jury was permitted to infer that he possessed the cocaine with the intent to deliver it. *Carter v. State*, 46 Ark. App. 205, 878 S.W.2d 772 (1994).

Evidence held sufficient of intent to deliver the cocaine where, in addition to the evidence that defendant was in constructive possession of the cocaine, the amount of cocaine possessed — in excess of one gram — created a statutory presumption that it was possessed with the intent to deliver. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

It is true that the weight of the drugs creates a presumption of intent to deliver; however, since the presumption is not conclusive, the State may offer additional evidence on the issue intent to deliver. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

Double Jeopardy.

There was no double jeopardy violation where defendant was sentenced for violating both subdivision (a)(1)(i) of this section (possession with intent to deliver a controlled substance) and § 5-74-106 (simultaneous possession of drugs and firearms); the legislature made it clear that it wished to assess an additional penalty for simultaneously possessing drugs and a firearm. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

Effect of Amendments.

Where the legislature in 1979 amended § 20-64-504 to make it a misdemeanor for any person, firm or corporation to sell a controlled substance without a permit, the legislature did not intend either expressly or impliedly to repeal this section. *Merrill v. State*, 277 Ark. 146, 640 S.W.2d 787 (1982).

The version of this section in effect on the date the crime was committed is the statute that must govern sentencing. *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

Under subdivision (a)(1)(i) of this section, the measurable amount of the methamphetamine, for the purpose of inferring intent under subsection (d) of this section, includes the amount of the pure drug plus all adulterants. *Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994).

Under subsection (d) of this section, the amounts of tested marijuana and cocaine

seized more than satisfied the rebuttable presumption that defendant possessed the controlled substances with intent to deliver. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994).

Elements of Offense.

Sale of a controlled substance is a violation of this section. *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987).

Evidence of an actual sale or transfer is not necessary to obtain a conviction of possession with intent to deliver; the key element of the crime is the intent to deliver, not the actual delivery. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Equal Protection.

There is no equal protection violation in the fact that someone convicted of selling controlled substances illegally under this section is guilty of a felony, while someone convicted of selling controlled substances without a permit under § 20-64-504 is guilty only of a misdemeanor. *Merrill v. State*, 277 Ark. 146, 640 S.W.2d 787 (1982).

Evidence.

In action for sale of controlled substance where undercover agent to whom defendant had sold controlled substance testified that defendant had told agent he had other types of drugs and named the other drugs, such testimony was simply a part of defendant's offer of the drugs he had for sale and did not amount to testimony of other criminal acts and thus was admissible in the context given. *Dail v. State*, 255 Ark. 836, 502 S.W.2d 456 (1973).

Evidence held sufficient to support conviction. *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974); *Lomax v. State*, 12 Ark. App. 330, 676 S.W.2d 464 (1984); *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986); *Denton v. State*, 290 Ark. 24, 716 S.W.2d 198 (1986); *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986); *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987); *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988); *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989); *Haygood v. State*, 34 Ark. App. 161, 807 S.W.2d 470 (1991); *Hattison v. State*, 36 Ark. App. 128, 819 S.W.2d 298 (1991); *Gilbert v. State*, 308 Ark. 565, 826 S.W.2d 240 (1992); *Standridge v. State*, 37 Ark. App. 153, 826 S.W.2d 303 (1992); *White v. State*, 39 Ark.

App. 52, 837 S.W.2d 479 (1992); *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997); *Stephenson v. State*, 334 Ark. 520, 975 S.W.2d 830 (1998); *McChristian v. State*, 70 Ark. App. 514, 20 S.W.3d 461 (2000); *Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001); *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001).

Evidence held sufficient to support verdict of abuse under subdivision (a)(1)(ii). *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974).

Where, after sale of controlled substance, a gun was found in the car, the gun was properly admitted as part of the res gestae and was pertinent evidence on the question of intent. *Freeman v. State*, 258 Ark. 496, 527 S.W.2d 623 (1975).

For cases discussing the admissibility of evidence of prior convictions, see *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976); *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978); *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

The introduction of a handgun was not prejudicial when it was found in the possession of one accused of possession with intent to deliver. *Leonard v. State*, 265 Ark. 937, 582 S.W.2d 15 (1979).

An undercover narcotics officer can be found competent to state his opinion regarding the substance he purchased and where officer, acting in an undercover capacity, and through prior experience, thought he was buying hashish, and in fact thought it was in sufficient quantity to have an effect on several persons, he properly testified to the nature of the transaction in a prosecution for delivery of controlled substance. *Euton v. State*, 270 Ark. 121, 603 S.W.2d 468 (Ct. App. 1980).

Where controlled substances were unavailable at time of trial as they had apparently been destroyed by those having custody of them but the officers testified in detail about the finding of such contraband, failure to present the drugs physically goes only to the weight of the proof presented by the state. *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980).

The trial court in a prosecution for possession of a controlled substance with intent to deliver did not abuse its discretion when it determined that a police officer had sufficient in-service training and experience to give an opinion as to what the dry weight of the marijuana would have been where the marijuana had been

seized in its green stage. *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982).

In a prosecution for delivery of cocaine it was not error for the court to admit evidence of the street value of the cocaine as the prejudicial effect did not outweigh its probative value. *Hoback v. State*, 286 Ark. 153, 689 S.W.2d 569 (1985).

Evidence held insufficient to convict. *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986); *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986); *Cerda v. State*, 303 Ark. 241, 795 S.W.2d 358 (1990); *Mosley v. State*, 40 Ark. App. 154, 844 S.W.2d 378 (1992).

There was no abuse of discretion in excluding the guilty pleas of the codefendants where the defendant was allowed to show that they were both serving sentences for their involvement. *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986).

Discrepancies in the testimony as to whether the informant's hands were always clearly visible during the first exchange, whether the cocaine was wrapped in tin foil or white paper, how thoroughly the informant was searched before the first exchange, and whether the second officer saw what the defendant handed to the informant did not make the evidence insufficient for three counts of delivery of controlled substances, as minor discrepancies, conflicts, and inconsistencies are for the jury to assess in weighing the testimony. *Parker v. State*, 290 Ark. 94, 717 S.W.2d 197 (1986).

Where all of the evidence objected to, grow lights, heater, fan, scales, hypodermic syringe and needle, was found at the same time as the marijuana, most of it in close proximity thereto, the evidence was part of the *res gestae* of the crime and was relevant in determining the motive of the defendant, and in light of the overwhelming evidence of possession, the appellant court did not find any abuse of the trial court's discretion in admitting the evidence. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Trial court properly took judicial notice of the fact that methamphetamine is a Schedule II controlled substance, and it was unnecessary to introduce evidence of state health department regulations. *Williams v. State*, 23 Ark. App. 121, 743 S.W.2d 402 (1988).

Evidence of the defendant's intent to

deliver a controlled substance was sufficient to submit the issue to the jury. *Johnson v. State*, 23 Ark. App. 200, 745 S.W.2d 651 (1988).

Burst package of cocaine with defendant's name and address on it, coupled with cocaine packaged in baggies and other air-express items found at his residence, makes it more probable that packaged cocaine found in his apartment was not there by mistake, as claimed by defendant, and further shows the overall plan to acquire and intent to distribute cocaine. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

Defendant's convictions were supported by substantial evidence, and the trial court did not err in denying his motion for a directed verdict. *Booker v. State*, 32 Ark. App. 94, 796 S.W.2d 854 (1990).

There was sufficient evidence to convict defendant of possession of a controlled substance with intent to deliver and of possession of drug paraphernalia. *Bailey v. State*, 307 Ark. 448, 821 S.W.2d 28 (1991).

Evidence was insufficient to compel reasonable minds to conclude that defendant was at the crime scene, and even less sufficient to compel the conclusion that he was engaged in the "manufacture" of marijuana. *Standridge v. State*, 310 Ark. 408, 837 S.W.2d 447 (1992).

Considering chemist's experience in the examination of controlled substances, it was not an abuse of discretion for the trial court to allow chemist to testify as to whether there was a usable amount of crack cocaine. *Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992).

Evidence that defendant sold a quantity of cocaine in exchange for money constituted substantial evidence to sustain conviction for the delivery of a controlled substance and it was not incumbent upon the state in these circumstances to produce evidence of a usable amount. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

Testimony of prior marijuana use and sale, as reflective of the accused's predisposition toward committing the crime of delivery of a controlled substance, is generally admissible to rebut the defense of entrapment, and is relevant on a material point in issue. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

Police officer's unequivocal testimony

identifying the accused as the man from whom he purchased the controlled substance was sufficient to sustain the conviction for unlawful delivery. *Jackson v. State*, 47 Ark. App. 86, 885 S.W.2d 303 (1994).

Evidence of possession of marijuana, possession of drug paraphernalia, and possession of an illicit whiskey still, found in defendant's residence, held sufficient. *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994).

Evidence held sufficient to support findings that the defendant was in possession of cocaine and a firearm. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Witness's testimony that she worked with defendants in manufacturing methamphetamine two months before they were arrested for drug-related charges was admissible as independently relevant to the issues of whether defendants were actually manufacturing methamphetamine, were using certain ordinary household items in the manufacturing process, merely possessed the drug or possessed it with intent to deliver, and whether the items found in the house could be used as drug paraphernalia. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

In a case involving the manufacture of a controlled substance, evidence held insufficient to satisfy the requirements of § 16-89-111(e)(1) of this section where the evidence produced by the State, other than the testimony of the accomplice, did no more than place defendant in a location where marijuana was used and where the marijuana growing plot was discussed. *Gordon v. State*, 326 Ark. 90, 931 S.W.2d 91 (1996).

Although there was some variance in the descriptions witnesses gave of the clothing worn by defendant, identification evidence held sufficient. *Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997).

Evidence was sufficient to support a conviction for possession of crack cocaine with intent to deliver where defendant was found in possession of a package containing 25 individually wrapped rocks of crack cocaine, notwithstanding the defendant's testimony that he had a cocaine problem and that the drugs were for his own personal use and the absence of contradictory testimony presented by the

state. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000).

Evidence was sufficient to establish constructive possession of marijuana where (1) the defendant was a passenger in his friend's car when the vehicle was stopped by a trooper, and (2) although marijuana found in the car was not in plain view nor on the defendant's person, the officer smelled a strong odor of marijuana emanating from the vehicle as he approached. *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999).

Evidence was insufficient to establish constructive possession of cocaine where (1) the defendant was a rear-seat passenger in his friend's car when the vehicle was stopped by a trooper, (2) the cocaine was not in plain view, was not under the defendant's exclusive control, and was not found near the seat in which he was seated, (3) there was no testimony that the defendant acted suspiciously, and there was no evidence of any contraband found on his person, and (4) there was testimony that the defendant did not know that there was cocaine in the car until after the police searched the vehicle. *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999).

Evidence was sufficient to prove that the defendant possessed a controlled substance with the intent to deliver where she was found in possession of more than six ounces of methamphetamine, which amount far exceeded the 200 milligram threshold required to establish a presumption of intent to deliver. *Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001).

Evidence was sufficient to prove that the defendant conspired to deliver methamphetamine where (1) she was found in possession of more than six ounces of methamphetamine, postal scales, over 200 syringes, numerous plastic bags, and over \$ 350,000 hidden throughout her residence, (2) she made several trips to visit her estranged husband in California, (3) during a six-month period most of her long distance calls were to California, and (4) she was the likely author of several letters recovered from her estranged husband's home, which letters outlined plans for the execution of a successful drug-trafficking scheme. *Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001).

Trooper made a traffic stop because

trooper had probable cause to believe that defendants' vehicle had violated a traffic law; even in the absence of reasonable suspicion, and without violating the Fourth Amendment, the trooper, with the trooper's police dog at the trooper's immediate disposal, could perform a permissible canine sniff, and once the dog alerted, that constituted probable cause for the trooper to search defendants' vehicle. *Miller v. State*, 81 Ark. App. 401, 102 S.W.3d 896 (2003).

Any difference in the witness descriptions of the cocaine "rocks" were held to be, at most, conflicts in evidence properly weighed by the finder of fact, rather than a failure to prove the authenticity of the cocaine. *Hawkins v. State*, 81 Ark. App. 479, 105 S.W.3d 397 (2003).

Trial court properly denied defendant's motion for directed verdict on his convictions for possession of drug paraphernalia with intent to manufacture and possession of a controlled substance because the evidence sufficiently linked defendant to the contraband in that it showed that: (1) there was an operational methamphetamine lab in the kitchen of the shared residence; (2) numerous items used for the manufacture of crystal methamphetamine was seized from the residence; (3) drug paraphernalia was also found in a burn barrel near the residence and in the trash can on the back porch, indicating an ongoing drug manufacturing process; (4) the trash bags found on the side of the road alerted the drug task force to the existence of an illegal drug lab and included a receipt from a store that listed several items used to manufacture crystal methamphetamine that was traced to defendant; and (5) the jury was not required to believe defendant's statements regarding items found in his office and his denial of any knowledge of the contraband. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

While constructive possession could be implied when the contraband was in the joint control of the accused and another, joint occupancy of a vehicle, standing alone, was insufficient to establish possession or joint possession; the state failed to provide additional factor linking defendant to the contraband to prove that he exercised care, control, and management over the contraband and that he knew the matter possessed was contraband. *Jones*

v. State, 83 Ark. App. 186, 119 S.W.3d 48 (2003).

Where numerous items found were found in defendant's home that could be used in the manufacture of methamphetamine, including liquid fire, naphtha, lighter fluid, camp fuel, acetone, denatured alcohol, plastic bottles with rubber tubing attached, a Pyrex dish, and numerous plastic bags containing black crystal, two trash bags containing red powder, and a forensic chemist concluded that manufacturing of methamphetamine was taking place, the evidence was sufficient to sustain defendant's convictions for manufacturing methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine. *Weatherford v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 785 (Oct. 29, 2003), cert. denied, 541 U.S. 1053, 124 S. Ct. 2187, 158 L. Ed. 2d 750 (2004).

In a drug case, the evidence was insufficient to sustain defendant's conviction where police saw no exchange of contraband or money between defendant and the drug dealers and no narcotics or large sums of money were found in defendant's possession. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

Evidence was insufficient to support defendant's conviction on possession of drug and drug paraphernalia charges where the only evidence that defendant had care, control, and management of the room where contraband for the manufacture of methamphetamine was seized came from two accomplices, and their testimony was uncorroborated. *Tate v. State*, 84 Ark. App. 184, 137 S.W.3d 404 (2003).

It was error to have convicted defendant of possession of a controlled substance with intent to deliver where his possession of .0993 grams of methamphetamine and \$1,677 in cash was not sufficient evidence that he was in possession with intent to deliver. *Zachary v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 16 (Jan. 7, 2004).

Where police discovered marijuana in a vehicle in which defendant was an occupant and then found individually wrapped bags of marijuana in defendant's shoe, the evidence was sufficient to support his conviction for possessing marijuana with intent to deliver. *Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004).

Although anhydrous ammonia, which

was necessary to the methamphetamine manufacturing process, was not found, the state's chemist testified that ammonia was found, as well as other indications regarding the presence of anhydrous ammonia, which could not be specifically tested for, and that there was not an active manufacture taking place when the police arrived; thus, the chemist's testimony sufficiently explained the absence of the anhydrous ammonia in a lab where manufacturing had already occurred and the evidence was sufficient to convict defendant of manufacturing methamphetamine. *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004).

Evidence was sufficient to convict defendant of simultaneous possession of drugs and firearms, in violation of § 5-74-106(a)(1), where the police discovered loaded weapons in the same out-building where methamphetamine had recently been manufactured in violation of subdivision (a)(1)(i). *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004).

Trial court had substantial evidence to support defendant's conviction for possession with intent to deliver methamphetamine; numerous items found during the execution of the warrant indicated that defendant was involved in the distribution of methamphetamine, defendant admitted that the items found in the apartment belonged to him, and defendant's girlfriend testified that she was with defendant when he actually sold methamphetamine to someone. *Von Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004).

Defendant's conviction for possession of cocaine with intent to deliver was affirmed based on evidence that he moved a backpack on a bus that contained cocaine during a narcotics search. *Ewings v. State*, 85 Ark. App. 411, 155 S.W.3d 715 (2004).

Evidence was sufficient to sustain a drug possession conviction where defendant was the driver of the car, the drugs were found directly behind the driver's seat, and he exercised dominion and control over the vehicle; in addition, defendant possessed 883.9 milligrams of the methamphetamine compound, which was a usable amount. *Jones v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 352 (May 27, 2004).

Where officers found quantities of over-the-counter cold medication used in the manufacture of methamphetamine in de-

fendant's car, a plastic bag containing .0993 grams of methamphetamine in defendant's pocket and \$1,677 cash in defendant's wallet, and where, on appeal, defendant offered nothing more than conclusory statements and failed to argue that possession of less than 200 mg of methamphetamine and the existence of large amounts of unexplained cash alone was insufficient to convict him of possession with intent to deliver, as opposed to simple possession, defendant's argument was not subject to review. *Zachary v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 420 (June 24, 2004).

Evidence was sufficient to sustain defendant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine where (1) defendant lived at the residence and was the person who repeatedly answered the door, (2) when defendant finally opened the door, an officer smelled a strong chemical odor, his eyes and nose began to burn, and his lips and tongue started to go numb, (3) items associated with the manufacture of methamphetamine were found throughout the residence, outside the residence, and in the garbage outside the residence, and (4) there were various stages of manufacturing occurring in different rooms of the residence. *Loy v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 732 (Oct. 13, 2004).

Given that defendant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of manufacturing methamphetamine. *Lueken v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 857 (Nov. 17, 2004).

Evidence was sufficient to sustain a conviction for possession of marijuana with intent to deliver where police entered defendant's home pursuant to a search warrant and, during the search, found seven ounces of marijuana, individually packaged in thirteen bags, hidden under the springs of the couch. *Crawford v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 696 (Sept. 28, 2005).

Heroin.

Subsection (d), which provides for a rebuttable presumption of intent to de-

liver if the defendant possesses more than 100 milligrams of heroin, refers to pure heroin, not to adulterated heroin. *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Indictment or Information.

Conviction of possession of a controlled substance with intent to deliver was upheld despite fact that information did not specify to whom accused intended to deliver. *Ryan v. State*, 260 Ark. 270, 538 S.W.2d 702 (1976).

Information charging the defendant with the sale of a controlled substance sufficiently informed defendant that he was charged with transferring a controlled substance in exchange for money under this section. *Dean v. State*, 293 Ark. 75, 732 S.W.2d 855 (1987).

Informers.

Where the informant was not present when the search was made, nor was the defendant charged with a sale that the informant witnessed, the defendant did not need to know the name of the confidential informant to prepare his defense. *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986).

Instructions.

An instruction which was almost a verbatim recitation of this section was reversible error as a prohibited comment on the evidence. *French v. State*, 256 Ark. 298, 506 S.W.2d 820 (1974).

Instruction that possession alone of a quantity of drugs in excess of a certain amount was sufficient to support an inference of guilt was improper as a comment on the weight of the evidence. *Pitts v. State*, 256 Ark. 693, 509 S.W.2d 809 (1974).

Instruction which quoted language of statute to the effect that possession of more than a specified amount of a drug created a rebuttable presumption that the possessor had the intent to deliver the drug in violation of the state violated the constitutional provision that the trial court shall not comment on the evidence. *Robinson v. State*, 256 Ark. 852, 510 S.W.2d 867 (1974).

General objection to instruction in the words of this statute as to presumption based on possession of a certain amount of heroin as being unconstitutional did not raise the issue of an impermissible com-

ment on the evidence by the judge. *Brooks v. State*, 256 Ark. 1059, 511 S.W.2d 654 (1974).

The court's failure to give a requested instruction on simple possession, because the controlled substance could have been for defendant's own personal use, was proper because the proof did not obligate the trial court to give the instruction. *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985).

The defendant was not entitled to have the jury instructed on possession of heroin as a lesser included offense of possession of heroin with the intent to deliver where he was found in possession of 5 times the quantity of heroin required to create a statutory rebuttable presumption of intent to deliver, he presented no evidence to rebut the presumption, and there was evidence presented to establish that he was a drug dealer. *Phillips v. State*, 332 Ark. 302, 965 S.W.2d 137 (1998).

Joinder of Offenses.

The trial court erred in failing to sever Count III from Counts I and II where Counts I and II each alleged that defendant had illegally delivered approximately $\frac{1}{4}$ gram of crack cocaine to a confidential informant in exchange for \$50.00 on October 21, 1993, and Count III alleged that defendant had delivered approximately $\frac{1}{4}$ gram of crack cocaine to a different confidential informant in exchange for \$50.00 on October 23, 1993, as the offenses did not involve a single scheme or plan. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

Lesser Included Offense.

Possession of heroin is a lesser included offense of delivery of heroin. *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981).

Criminal solicitation and criminal attempt are not lesser included offenses under delivery of a controlled substance. *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982).

Evidence held sufficient to support conviction for lesser included offense of possession of a controlled substance. *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987).

Although the 91.9 grams of methamphetamine was only 10.2% pure, amounting to less than 28 grams of actual meth-

amphetamine, the trial court did not err in refusing to instruct the jury on a lesser included offense, since subdivision (a)(1)(i) clearly provides that punishment is to be determined by the aggregate weight of the drugs. *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993).

Possession under subsection (c) is a lesser included offense of manufacturing under subsection (a). *Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993).

In a prosecution for manufacture of methamphetamine, the court correctly refused to instruct the jury on possession of ephedrine with intent to manufacture methamphetamine as a lesser included offense since the proffered instruction was an incorrect statement of the law as it added a level of culpability not found in the definition of the offense and referred to the separate offense of ephedrine possession. *Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712 (1999).

While there was not substantial evidence to support defendant's conviction for possession of methamphetamine with intent to deliver, there was clearly substantial evidence to support a conviction for the lesser-included offense of possession of methamphetamine, given that defendant admitted to possession of the small quantity seized from the kitchen table; where the evidence was insufficient to sustain a conviction for a certain crime, but where there was sufficient evidence to sustain a conviction for a lesser-included offense, the appellate court could resentence the defendant or remand the case to the trial court for resentencing. *Cooper v. State*, 84 Ark. App. 342, 141 S.W.3d 7 (2004).

Manufacture.

Since marijuana can be manufactured or produced only by cultivating the plants, defendant, who admitted growing marijuana with intent to harvest it, could be convicted of "manufacturing" marijuana irregardless of defendant's personal reasons for such production. *Patty v. State*, 260 Ark. 539, 542 S.W.2d 494 (1976).

Defendant who watered, pruned and generally tended the marijuana plant next to his office building clearly violated subsection (a)'s prohibition against the manufacture of a controlled substance. *Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993).

There was sufficient evidence to support a conviction for manufacturing methamphetamine based on accomplice liability where the evidence showed that drug manufacturing was taking place on defendant's property, defendant admitted knowledge of the operation, and a co-defendant also testified regarding defendant's knowledge of the operation. *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004).

There was substantial evidence to support defendant's conviction for manufacturing methamphetamine because, although there was no HCL generator discovered in the search of defendant's house, a substance identified as methamphetamine oil was found, which was the second-to-last stage in the process of manufacturing methamphetamine; although the manufacturing process was not finished, it had proceeded to all but the final stage, and the components necessary for completion had been assembled. *Dodson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 897 (Dec. 1, 2004).

There was sufficient evidence to support a conviction for manufacturing methamphetamine where it was shown that many components of the manufacturing process were found inside of defendant's van; the fact that all of the necessary components and the finished product were not found was irrelevant. *Saul v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 491 (June 22, 2005).

Marijuana.

When marijuana is weighed the stalks are excluded, but the stems and seeds are included. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995).

Multiple Offenses.

Simultaneous possession for delivery of drugs classified under subsection (a)(1)(i) or under subsection (a)(1)(ii) constituted only one offense; however, simultaneous possession for delivery of drugs in both categories would constitute two separate offenses. *Pitts v. State*, 256 Ark. 693, 509 S.W.2d 809 (1974).

Defendant's act in pinching leaves from a marijuana plant not only violated the manufacturing of marijuana law; by taking the marijuana inside the building to dry, he at the same time violated subsection (c) which makes it unlawful for any

person to possess a controlled substance. *Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993).

Felony convictions for the related offenses of possession of a controlled substance under this section and possession of drug paraphernalia under § 5-64-403 fall under two separate statutes and are not considered one offense for the purposes of sentencing under § 5-4-501. *McCullough v. State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993).

There was substantial evidence that defendant knew of and had control of contraband, possessed it with the intent to deliver, had simultaneous possession of cocaine and firearm, and that he was a felon in possession of a firearm. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995).

Severance of counts denied where defendant picked up amphetamines and had metamphetamine in his jeans pocket; defendant was in possession of two distinct amounts of the same type of controlled substance at the same time and at the same location. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

Participants to Transactions.

Where a narcotics officer had negotiated with defendant about selling him a controlled substance, the officer gave money to defendant's confederate and the defendant's accomplice delivered a controlled substance to the officer, evidence was sufficient to show that the defendant was an active participant in the transaction. *Merritt v. State*, 258 Ark. 558, 528 S.W.2d 365 (1975).

Where defendant was present with others during the sale of controlled substance, although he had no direct contact with the officers making the purchase, the trial court could reasonably infer that the defendant, being present, was an active participant in the offense. *Hartman v. State*, 258 Ark. 1018, 530 S.W.2d 366 (1975).

Where the defendant simply introduced the undercover officers to the sellers of controlled substance from whom the officers bought controlled substance, the defendant was not guilty of delivering controlled substance since he would have had to take a more active part to be a principal or even an accomplice. *Daigger v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980).

Case law is well established that one who buys a controlled substance is not an accomplice of the person who sells or delivers it since the buyer and seller do not share the same criminal purpose. *Brizendine v. State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982).

Where it was undisputed that the defendant took an undercover narcotics officer's money, purchased controlled substance, and then transferred the controlled substance to the undercover officer, the defendant violated the provision of subdivision (a)(1)(iv) regardless of whether the defendant was acting as an agent of the buyer or the seller. *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985).

This section does not require that the perpetrator ultimately receive money, only that he participate in the transfer of the substance in exchange for money or anything of value; the fact that an accused is only the agent of a buyer or seller of drugs does not remove the transfer from the ambit of this section. *Higgs v. State*, 313 Ark. 272, 854 S.W.2d 328 (1993).

Reverse buys do not constitute entrapment as a matter of law. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

Personal Use.

Where persons accused of possession of more than one ounce of marijuana submitted evidence that they had purchased one half pound for their own use, whether the evidence rebutted the presumption that their possession was with intent to deliver was for the jury. *Hooper v. State*, 257 Ark. 103, 514 S.W.2d 394 (1974).

In prosecution for possession of marijuana with intent to deliver, the court would not take judicial notice of the quantities of marijuana that would be more consistent with individual use than with distribution, for the practices and usages in relation to marijuana are not matters of common knowledge. *Jackson v. State*, 259 Ark. 780, 536 S.W.2d 716 (1976).

Possession.

Evidence held to be sufficient circumstances for jury to draw reasonably the conclusion that the defendant had joint possession of the substance even though that possession might have been constructive. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976).

Evidence held sufficient to find that it was error for the trial court not to instruct the jury on the lesser misdemeanor charge of possession of controlled substance at defendant's prosecution for possession with intent to deliver controlled substance. *Milburn v. State*, 260 Ark. 553, 542 S.W.2d 490 (1976), *aff'd*, 262 Ark. 267, 555 S.W.2d 946 (1977).

Evidence held sufficient to support a conviction for possession of controlled substance. *Newberry v. State*, 261 Ark. 648, 551 S.W.2d 199 (1977); *Wade v. State*, 267 Ark. 1101, 594 S.W.2d 43 (Ct. App. 1980); *Williams v. State*, 271 Ark. 435, 609 S.W.2d 37 (1980); *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987); *Johnson v. State*, 23 Ark. App. 200, 745 S.W.2d 651 (1988); *Nowden v. State*, 31 Ark. App. 266, 792 S.W.2d 621 (1990); *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993).

It cannot be inferred that one in nonexclusive possession of premises knew of the presence of drugs and had joint control of them unless there were other factors from which the jury can reasonably infer the accused had joint possession and control. *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978).

Evidence held insufficient to support conviction for possession of a controlled substance. *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978).

Actual or physical possession is not required. *Wade v. State*, 267 Ark. 1101, 594 S.W.2d 43 (Ct. App. 1980).

Joint occupancy of premises alone will not be sufficient to establish possession or joint possession unless there are additional factors from which the jury can infer possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982).

There are two separate problems involved in establishing the defendant's "exclusive control" of the premises in order to impute possession; the first is whether the accused is a sole or joint occupant, and the second is, if the accused is the sole occupant, does he have actual exclusive control of the premises. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982).

Possession need not be actual, physical possession, but may be constructive, when one controls a substance or has the right to control it; constructive possession can be implied when the contraband is found

in a place immediately and exclusively accessible to the defendant and subject to his control, or to the joint control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982).

Evidence held sufficient to enable the jury to infer constructive possession on the part of the defendants. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

Possession may be constructive when one controls a substance or has the right to control it; actual physical possession at the time of the arrest is not required. *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986).

Where the defendant obtained the controlled substance pursuant to a prescription, his possession was lawful even though the defendant failed to use the prescription as directed. *Wilson v. State*, 290 Ark. 397, 720 S.W.2d 292 (1986).

The possession required by this section need not be actual, physical possession, but may be constructive, as when one controls a substance or has the right to control it. *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986).

Where there is joint occupancy of premises, mere occupancy is insufficient to prove possession unless there are additional factors linking the accused with the contraband. *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986).

Possession excludes a passing control, fleeting and shadowy in nature; however, this exclusion does not insulate from prosecution those who seek to dispose of contraband upon discovering that the police are approaching. *Turner v. State*, 24 Ark. App. 102, 749 S.W.2d 339 (1988).

Evidence held sufficient to support conviction for possession of controlled substance and for possession of paraphernalia. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

Where contraband is discovered in jointly occupied premises, and there is no direct evidence that it belongs to a particular occupant, some additional factor must be present linking the accused to the contraband. The state must prove that the accused exercised care, control and management over the contraband. *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990).

The state need not prove that the accused had actual possession of a controlled substance; constructive possession is sufficient. Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991).

Neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991).

Substantial evidence of constructive possession existed where abundant amounts of contraband lay in front of the defendant, in plain view, on the table, in his house when the police arrived. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

In order to prove a defendant is in possession of a controlled substance, constructive possession is sufficient; neither exclusive nor actual, physical possession of a controlled substance is necessary to sustain a charge. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993); *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994).

Factors that sufficiently link an accused to contraband found in a car jointly occupied by more than one person include the following: the contraband's being (1) in plain view; (2) on the defendant's person or with his personal effects; (3) found on the same side of the car seat as the defendant or in immediate proximity to him; or that the accused (4) owned the vehicle in question or exercised dominion and control over it; and (5) acted suspiciously before or during arrest. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993); *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Evidence of possession with intent to deliver a controlled substance (marijuana) and possession with intent to use drug paraphernalia held sufficient. *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994).

The exemption in § 3-3-203(a)(2), stating that intoxicating liquor, wine, or beer in the body of a minor shall not be deemed to be in his possession, is not contained within the controlled substances statutes. *Embry v. State*, 50 Ark. App. 245, 905 S.W.2d 73 (1995).

Among the "linking" factors this court has considered in cases involving vehicles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with accused's personal effects; (3) whether the contraband is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; (5) whether the accused acted suspiciously before or during the arrest. Courts have also considered the improbability that anyone other than the occupants of the vehicle placed the contraband in the vehicle; and the improbable nature of the accused's explanation for his journey. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Where possession is based on joint occupancy of the premises where contraband is found, the State must prove two elements: (1) that the accused exercised care, control, and management over the contraband; and (2) that the accused knew that the matter possessed was contraband. *Williams v. State*, 54 Ark. App. 352, 927 S.W.2d 801 (1996), *aff'd*, 327 Ark. 213, 939 S.W.2d 264 (1997).

Evidence of defendant's possession of drugs seized from her home held sufficient. *Williams v. State*, 54 Ark. App. 352, 927 S.W.2d 801 (1996), *aff'd*, 327 Ark. 213, 939 S.W.2d 264 (1997).

Evidence of possession held sufficient, even though parcel delivery service package was addressed to defendant's son, where defendant's activity in attempting to retrieve the package from the delivery service office supported the inference that defendant knew what the package contained. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

Evidence of possession held sufficient where the drugs and the defendant were both in a garage and the drug container was on the floor three feet from the defendant. *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997).

State did not have to show that defen-

dant physically possessed the handgun in order to sustain a conviction for its possession if the gun's location was such that it was under defendant's dominion and control; the gun in defendant's kitchen next to items used to manufacture methamphetamine sufficiently met that burden. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003).

Where contraband is discovered in jointly occupied premises and there is no direct evidence that it belongs to a particular occupant, some additional factors must be present linking the accused to the contraband; the state must prove that the accused exercised care, control and management over the contraband. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

During a random inspection of his truck, where defendant gave police officer the key to his trailer and consented to the search of his truck, evidence was sufficient to show that defendant constructively possessed 334.4 pounds of marijuana found in duffel bags and 4.26 pounds of cocaine found in the trailer; although there was a passenger in the cab, defendant had the only key to the locked trailer. *McKenzie v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 298 (May 12, 2005).

Presumptions.

In view of fact that evidentiary rebuttal could have come from testimony other than that of defendant, the rebuttable presumption, provided for in subsection (d) did not invade defendant's right against self-incrimination. *Jackson v. State*, 259 Ark. 780, 536 S.W.2d 716 (1976).

The presumption in subsection (d) has no application to a civil forfeiture proceeding. *Burnett v. State*, 51 Ark. App. 144, 912 S.W.2d 441 (1995).

Since defendant possessed methamphetamine in an amount in excess of the statutory presumption in subsection (d), the evidence was sufficient to support a conviction of possession with intent to deliver. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996).

Although methamphetamine is not specifically listed in subsection (d), there is a general provision for a controlled substance falling into the category of a "stimulant drug"; therefore, possession of more than 200 milligrams of methamphetamine gives rise to a presumption of in-

tent to deliver. *Von Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004).

Ample evidence supported defendant's conviction for possession of methamphetamine with intent to distribute where he exercised control over the 16 grams of methamphetamine and stated he had already sold some but offered to sell the remainder to an undercover officer. *Dodson v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 494 (Sept. 16, 2004).

There was substantial evidence to support defendant's conviction for manufacturing methamphetamine with intent to deliver because the methamphetamine that was discovered weighed .2809 grams, defendant's wife testified that defendant produced methamphetamine for sale and, under subsection (d) of this section, there is a statutory rebuttable presumption that one in possession of a stimulant drug weighing in excess of 200 milligrams possesses the contraband with the intent to deliver. *Dodson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 897 (Dec. 1, 2004).

Probation.

Defendant, who was found guilty of possession of cocaine with intent to deliver and sentenced to five years imprisonment under subdivision (a)(1)(i), had the right to have the trial judge consider probation. *Pennington v. State*, 305 Ark. 507, 808 S.W.2d 780 (1991).

The court abused its discretion in failing to consider probation where defendant was sentenced for possession of marijuana and cocaine with intent to deliver. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991).

Trial court did not err in refusing to allow defendant the opportunity to question crime lab personnel after he had properly demanded to do so, pursuant to § 12-12-313, as it was a felony to sell counterfeit drug substances under subdivision (b)(1)(i) of this section; defendant had committed an offense punishable by incarceration and was subject to a revocation of his probation, whether or not the substances found in the two baggies were narcotics, thus, the crime lab personnel's testimony was not necessary to prove the prosecution's case. *Roston v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 314 (May 19, 2005).

Search.

Based on the officers' experience with

the Drug Task Force, they could not have reasonably presumed the arrest warrant be valid on its face, as it stated defendant had committed an offense that did not exist under this section. *Abbott v. State*, 307 Ark. 278, 819 S.W.2d 694 (1991).

Stop was not justified where there was no testimony that the officer was investigating or preventing a crime when she encountered defendant, therefore, the search was illegal and defendant's motion to suppress the evidence of the cocaine and the firearm should have been granted. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

In a possession of drug paraphernalia with intent to manufacture and possession of a controlled substance case, the search warrant was valid and the trial court properly denied defendant's motion to suppress the evidence seized from the shared residence where: (1) the distinctive odor of a methamphetamine lab was a valid contributing factor in establishing probable cause for the warrant; (2) the search warrant was supported by more than mere conclusory statements; (3) the initial search of the residence was limited to the common area outside the residence where no warrant was required, and the search inside the residence was pursuant to a search warrant; (4) even if the landlord's statements were completely eliminated, there were still sufficient facts to support probable cause to search the residence; and (5) the partially incorrect address listed in the search warrant did not make the search warrant defective, especially since the affidavit correctly identified the residence and officer who had obtained the search warrant and had previously been to the residence would later, himself, conduct the search. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

While federal marshals were arresting defendant at his apartment for a violation of probation, the marshals discovered what they suspected to be cocaine in the bathroom and called the city police, who determined that the substance in the bathroom, which was in plain view, was cocaine, however, the city police officers improperly searched a black bag in another room without defendant's consent; thus, if the evidence found in the illegal search of black bag motivated the officers to obtain a search warrant, the illegal

search would preclude application of the independent-source doctrine and the evidence would be inadmissible. *Lauderdale v. State*, 82 Ark. App. 474, 120 S.W.3d 106 (2003).

Based on a search pursuant to a federal warrant, the officers knew the mailed package contained drugs, but when the officers delivered the package to defendant, entered defendant's residence through a closed screen door without a warrant, then pursued defendant, who fled to the bathroom with the package, the purported exigent circumstances were manufactured by the officers and the trial court erred in denying defendant's motion to suppress. *Mann v. State*, 84 Ark. App. 225, 137 S.W.3d 411 (2003).

Pursuant to a report of a drug related disturbance, officer stopped defendant's vehicle and conducted a pat-down of defendant without any objective, factual basis for a reasonable belief that defendant was dangerous or might have gained immediate control of a weapon, moreover, the illegal frisk was not cured by defendant's purported consent in turning over the small bottle in his pocket as the lapse of time between the pat-down and the request to see what was in his pocket was not sufficient to dissipate the taint; thus, the methamphetamine seized as a result of the illegal frisk was the fruit of the poisonous tree and had to be suppressed. *Hill v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 9 (Jan. 5, 2005).

Sentencing.

For cases discussing sentencing pursuant to this section, see *Backus v. State*, 253 Ark. 60, 484 S.W.2d 515 (1972) (decision prior to 1972 amendment); *Andrews v. State*, 262 Ark. 190, 555 S.W.2d 224 (1977); *Cardwell v. State*, 264 Ark. 862, 575 S.W.2d 682 (1979); *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980).

Where the defendant was improperly sentenced under subdivision (a)(1)(i) of this section, and both parties agreed on what the sentence should have been, the Court of Appeals reduced the defendant's sentence to a minimum under the proper statute, subdivision (a)(1)(ii) of this section. *Mincy v. State*, 19 Ark. App. 80, 717 S.W.2d 213 (1986).

Defendant charged with delivery of a controlled substance under subdivision

(a)(1)(i) and as an habitual offender under § 5-4-501 is subject to the range of sentences for Class Y felonies under § 5-4-501. *Williams v. State*, 292 Ark. 616, 732 S.W.2d 135 (1987).

General Assembly, on passing Acts 1985, No. 669 amending this section, did not want trial courts to be limited to the dispositions authorized by § 5-4-401 for Class Y felonies; rather, the legislative intent was to take the profit out of selling drugs and to impose longer sentences. *Williams v. State*, 292 Ark. 616, 732 S.W.2d 135 (1987).

The enhancement provided for under § 5-4-501 is greater when subsection (c) of this section is first applied to enhance the offense class. *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993).

Under the plain language of subsection (c) of this section, a defendant's previous out-of-state conviction is not a violation of "this subsection" and therefore could not be used to increase defendant's offense level. *Prichard v. Lockhart*, 990 F.2d 352 (8th Cir. 1993).

The circuit court erred by imposing a sentence of three years' supervised probation for possession of a controlled substance with intent to deliver, pursuant to § 16-93-501(10) (repealed), where intent to deliver cocaine was a Class Y felony and a minimum sentence of 10 years was mandatory under former §§ 5-4-301(a)(1)(F) and former 5-4-104(e)(1)(F) (now see § 5-4-104(e)(1)(A)(6)). *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994).

Where defendant pled guilty to possession with the intent to deliver, and should have been sentenced to at least ten years imprisonment without probation under subdivision (a)(1)(i) of this section, the trial judge had no authority to order probation based on the judge's sua sponte reduction of the charge to mere possession. *State v. Knight*, 318 Ark. 158, 884 S.W.2d 258 (1994).

The statutes do not allow a judge to sentence a defendant to a fifty-four month sentence when the statutory minimum is ten years. *Pickett v. State*, 321 Ark. 224, 902 S.W.2d 208 (1995).

Where object of defendant's and codefendant's conspiracy was to purchase and possess cocaine with the intent to deliver it, a Class Y felony under the penalty section of the Uniform Controlled Substances Act, the verdict form containing

the habitual sentencing range for a Class A felony was correct. *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996).

Section 5-4-104(e)(3) did not give the trial court authority to add five-year suspended sentences to the terms of imprisonment fixed by the jury in finding defendant guilty of manufacturing methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine, even though the additional imposition of sentence was suspended. *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

Defendant correctly asserted that the application of the 70 percent parole-eligibility rule to defendant's sentence for manufacture of methamphetamine, a 1998 offense, would have been an ex post facto law in violation of the federal and state constitutions, since at that time § 16-93-611 did not include manufacture of methamphetamine. *McGhee v. State*, 82 Ark. App. 105, 112 S.W.3d 367 (2003).

Defendant's 25-year sentence for his conviction of delivery of a controlled substance, where the jury found defendant guilty of possessing .209 grams of crack cocaine, was not disproportionate, nor cruel and unusual, as it was a mid-range sentence for the Class Y felony offense and none of the sentencing exceptions applied. *Williams v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 10 (Jan. 7, 2004).

Where the jury convicted defendant of possession of cocaine with intent to deliver and recommended a sentence of 3 years' probation, the trial court was permitted to sentence defendant to 20 years' imprisonment rather than follow the jury's recommendation; the jury's recommendation of 3 years' probation was not authorized by subdivision (a)(1), which required a minimum sentence of 20 years. *Ewings v. State*, 85 Ark. App. 411, 155 S.W.3d 715 (2004).

Testimony.

Defendant's failure to object to the informant's testimony at the first opportunity barred him from arguing this point on appeal. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

Defendant's motion for a directed verdict based on the claim that accomplice testimony was not credible was properly denied where testimony about the agree-

ment between accomplice and defendant to manufacture methamphetamine for sale, and the actual manufacture, was corroborated by the presence of numerous precursor products and substances found in the search of defendant's house; in any event, the question of the accomplice's credibility was for the jury and substantial evidence supported defendant's conviction. *Wilson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 738 (Oct. 27, 2004).

Unclassified Substance.

Because hashish is a controlled substance not classified in Schedules I, II, III, IV, or V, delivery of a counterfeit substance purporting to be hashish is not in violation of Arkansas law. *Abbott v. State*, 307 Ark. 278, 819 S.W.2d 694 (1991).

Usable Amounts.

Conviction under this section was reversed where defendant was found to be in possession of a bottle which had less than a usable amount of cocaine. *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990).

Conviction for possessing a "usable amount" of cocaine was upheld, even though chemist could not testify as to the effect of twelve milligrams on the human body, but could testify that he had seen pieces of crack cocaine of that size loaded into a pipe. *Buckley v. State*, 36 Ark. App. 7, 816 S.W.2d 894 (1991).

Provision of (a)(1)(i) that one who delivers a controlled substance which by aggregate weight, including adulterants or dilutents, is less than 28 grams, is guilty of a felony, strongly suggests that delivery of any amount of a controlled substance is criminal. *Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992).

The state is not required to prove that a usable amount of a controlled substance was delivered in order to sustain a conviction for delivery; usable amount is a factor to be considered where the accused is charged with possession of a controlled substance. *Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992).

Possession of a controlled substance must be of a measurable or usable amount to constitute a violation of this section. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

The usable amount standard applied to

cases of possession has no application to cases of delivery. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

Evidence was sufficient for the fact finder to determine that the substance was of a measurable amount where the cocaine was capable of quantitative analysis, could be seen with the naked eye, was tangible and could be picked up. *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993).

Although there was no evidence as to the weight of the phencyclidine (PCP), there was substantial evidence to support the finding that a usable amount was detected on a marijuana cigarette that had been dipped in PCP. *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994).

Cited: *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985); *Toland v. State*, 285 Ark. 415, 688 S.W.2d 718 (1985); *Westbrook v. State*, 286 Ark. 192, 691 S.W.2d 123 (1985); *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985); *Barnes v. State*, 15 Ark. App. 153, 691 S.W.2d 178 (1985); *Herrington v. State*, 15 Ark. App. 248, 692 S.W.2d 251 (1985); *Crossno v. State*, 15 Ark. App. 341, 692 S.W.2d 626 (1985); *Cook v. State*, 293 Ark. 103, 732 S.W.2d 462 (1987); *Johnson v. State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987); *Munguia v. State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987); *Williams v. State*, 22 Ark. App. 253, 739 S.W.2d 174 (1987); *Ingle v. State*, 294 Ark. 353, 742 S.W.2d 939 (1988); *Hurvey v. State*, 298 Ark. 289, 766 S.W.2d 926 (1989); *Campbell v. State*, 27 Ark. App. 82, 766 S.W.2d 940 (1989); *Hodges v. State*, 27 Ark. App. 154, 767 S.W.2d 541 (1989); *Everett v. State*, 27 Ark. App. 228, 769 S.W.2d 421 (1989); *State v. McMullen*, 302 Ark. 252, 789 S.W.2d 715 (1990); *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990); *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Gomez v. State*, 305 Ark. 496, 809 S.W.2d 809 (1991); *Bliss v. State*, 33 Ark. App. 121, 802 S.W.2d 479 (1991); *Davis v. State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991); *Hutcherson v. State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991); *Lambert v. State*, 34 Ark. App. 227, 808 S.W.2d 788 (1991); *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992); *Baker v. State*, 310 Ark. 485, 837 S.W.2d 471 (1992); *Shaver v. State*, 37 Ark. App. 124, 826 S.W.2d 300 (1992); *Hawk v. State*, 38 Ark. App. 1, 826 S.W.2d 824 (1992); *Davison v. State*, 38 Ark. App.

137, 831 S.W.2d 160 (1992); Phillips v. State, 40 Ark. App. 19, 840 S.W.2d 808 (1992); State v. Mosley, 313 Ark. 616, 856 S.W.2d 623 (1993); Leavy v. State, 314 Ark. 231, 862 S.W.2d 832 (1993); Hill v. State, 314 Ark. 275, 862 S.W.2d 836 (1993); Ramey v. State, 42 Ark. App. 242, 857 S.W.2d 828 (1993); Caulkins v. Crabtree, 319 Ark. 686, 894 S.W.2d 138 (1995); Stewart v. State, 320 Ark. 75, 894 S.W.2d 930 (1995); Mitchell v. State, 321 Ark. 570, 906 S.W.2d 307 (1995); Henderson v. State, 322 Ark. 402, 910 S.W.2d 656 (1995); McCoy v. State, 326 Ark. 104, 929 S.W.2d 712 (1996); Whitney v. State, 326

Ark. 206, 930 S.W.2d 343 (1996); Wright v. State, 327 Ark. 455, 939 S.W.2d 835 (1997); Rhea v. State, 327 Ark. 518, 938 S.W.2d 857 (1997); Ray v. State, 328 Ark. 176, 941 S.W.2d 427 (1997); Williams v. State, 328 Ark. 487, 944 S.W.2d 822 (1997); Manning v. State, 330 Ark. 699, 956 S.W.2d 184 (1997); Stewart v. State, 332 Ark. 138, 964 S.W.2d 793 (1998); State v. Stephenson, 340 Ark. 229, 9 S.W.3d 495 (2000); Colbert v. State, 340 Ark. 657, 13 S.W.3d 162 (2000); Wyatt v. State, 75 Ark. App. 1, 54 S.W.3d 549 (2001); Summers v. Garland, 352 Ark. 29, 98 S.W.3d 23 (2003).

5-64-402. Offenses relating to records, maintaining premises, etc.

(a) It is unlawful for any person:

(1) To refuse an entry into any premises for any inspection authorized by this chapter; or

(2) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, or other structure or place or premise, that is resorted to by a person for the purpose of using or obtaining these substances or that is used for keeping them in violation of this chapter.

(b)(1) Any person who violates this section is guilty of a Class D felony.

(2) However, a violation of this section is a Class B felony if the violation is committed on or within one thousand feet (1,000') of the real property of a certified drug free zone.

(c) The following are certified drug free zones:

(1) A city or state park;

(2) A public or private elementary or secondary school, public vocational school, or public or private college or university;

(3) A community or recreation center;

(4) A Boys Club, Girls Club, YMCA, or YWCA; or

(5) A skating rink or video arcade.

History. Acts 1971, No. 590, Art. 4, § 2; 1975 (Extended Sess., 1976), No. 1225, § 1; 1977, No. 557, § 2; A.S.A. 1947, § 82-2618; reen. Acts 1987, No. 1013, § 1; 1993, No. 1189, § 6; 2005, No. 1994, § 305[B].

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1013, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Acts 1993, No. 1189, § 1, provided: "(a) The General Assembly of the State of

Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas further finds that the number of school related crimes is increasing.

"(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees."

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections

designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2005 amendment deleted former (a)(1); redesignated former

(a)(2) and (a)(3) as present (a)(1) and (a)(2); deleted “subchapters 1-6 of” preceding “this chapter” in (a)(2); and deleted former (d) and made a related change.

CASE NOTES

Evidence.

Evidence was sufficient to support conviction for operating a drug premises. *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

There was insufficient evidence to support a finding of constructive possession where there were no drugs found in plain view, in the common areas of the house, or in the bedroom occupied by defendant, and there were no statements by defendant or by anyone else suggesting that defendant knew that drugs were kept in the house, used there, or sold there. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998).

Given that defendant owned the pre-

mises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of maintaining a drug premises. *Lueken v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 857 (Nov. 17, 2004).

Cited: *Jeffries v. State*, 255 Ark. 501, 501 S.W.2d 600 (1973); *Patty v. State*, 260 Ark. 539, 542 S.W.2d 494 (1976); *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977); *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994); *Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995).

5-64-403. Fraud — Criminal penalties — Drug Paraphernalia.

(a) **FRAUD.** It is unlawful for any person knowingly or intentionally to:

(1) Distribute as a registrant a controlled substance classified in Schedule I or Schedule II, except pursuant to an order form as required by § 5-64-307;

(2) Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or theft;

(3) Furnish false or fraudulent material information in, or omit any material information from, any record, application, report, or other document required to be kept or filed under this chapter;

(4) Make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any trademark, trade name, or other identifying mark, imprint, or device of another upon any drug or container or labeling of a drug or container so as to render the drug a counterfeit substance; and

(5)(A) Agree, consent, or in any manner offer to unlawfully sell, furnish, transport, administer, or give any controlled substance to any person, or to arrange for any of the above, and then to substitute a non-controlled substance in lieu of the controlled substance bargained for.

(B) The proffer of a controlled substance creates a rebuttable presumption of intent to deliver that does not require additional showing of specific intent to substitute a noncontrolled substance.

(b) PENALTIES.

(1) Any person who violates any provision of subdivisions (a)(1)-(4) of this section is guilty of a Class C felony.

(2) Any person who violates subdivision (a)(5) of this section with respect to:

(A) A noncontrolled substance represented to be a controlled substance classified in Schedule I or Schedule II that is a narcotic drug is guilty of a Class B felony;

(B) Any other noncontrolled substance represented to be a controlled substance classified in Schedule I, Schedule II, or Schedule III is guilty of a Class C felony;

(C) A noncontrolled substance represented to be a controlled substance classified in Schedule IV is guilty of a Class C felony;

(D) A noncontrolled substance represented to be a controlled substance classified in Schedule V is guilty of a Class C felony; and

(E) A noncontrolled substance represented to be a controlled substance classified in Schedule VI is guilty of a Class D felony.

(c) DRUG PARAPHERNALIA.

(1)(A)(i) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

(ii) A violation of subdivision (c)(1)(A)(i) of this section is a Class A misdemeanor.

(B) Any person who violates subdivision (c)(1)(A)(i) of this section in the course of and in furtherance of a felony violation of this chapter is guilty of a Class C felony.

(2)(A)(i) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia knowing, or under circumstances in which a person reasonably should know, that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

(ii) Any person who violates subdivision (c)(2)(A)(i) of this section is guilty of a Class A misdemeanor.

(B) Any person who violates subdivision (c)(2)(A)(i) of this section in the course of and in furtherance of a felony violation of this chapter is guilty of a Class C felony.

(3)(A) Any person eighteen (18) years of age or over who violates subdivision (c)(2)(A)(i) of this section immediately preceding by delivering drug paraphernalia in the course of and in furtherance of a felony violation of this chapter to a person under eighteen (18) years of age who is at least three (3) years his or her junior is guilty of a Class B felony.

(B) Otherwise, any person eighteen (18) years of age or over who violates subdivision (c)(2)(A)(i) of this section by delivering drug paraphernalia to a person under eighteen (18) years of age who is at least three (3) years his or her junior is guilty of a Class A misdemeanor.

(4)(A) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement knowing, or under circumstances in which a person reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of a counterfeit substance or of an object designed or intended for use as drug paraphernalia.

(B) Any person who violates this subdivision (c)(4)(A) is guilty of a Class C felony.

(5)(A) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine in violation of this chapter.

(B) Any person who pleads guilty or nolo contendere to or is found guilty of violating subdivision (c)(5)(A) of this section is guilty of a Class B felony.

History. Acts 1971, No. 590, Art. 4, § 3; 1972 (Ex. Sess.), No. 67, § 2; 1977, No. 557, § 3; 1981, No. 78, § 2; 1981, No. 116, §§ 2, 3; 1981, No. 117, § 1; 1983, No. 787, § 6; A.S.A. 1947, § 82-2619; Acts 1999, No. 326, § 1; 1999, No. 1268, § 3; 2001, No. 1451, § 1; 2005, No. 1994, § 305[B].

A.C.R.C. Notes. Acts 1999, No. 1268, § 1, provided: "This act shall be known as the 'Arkansas Methamphetamine Lab Act of 1999'."

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2001 amendment added the subdivision designations in (c)(1)-(3); added the last sentence in

(c)(2)(A); inserted "subdivision (c)(2)(A) of" in (c)(2)(B); added (c)(3)(B); and made minor stylistic changes throughout.

The 2005 amendment added the subsection headings; deleted "subchapters 1-6 of" preceding "this chapter" twice in (a)(3), and in present (c)(1)(A)(i), (c)(1)(B), (c)(2)(A), (c)(2)(B), and (C)(3)(A); inserted "record" in (a)(3); redesignated former (b)(2)(i)-(v) as present (b)(2)(A)-(E); in (c)(3)(B), substituted "Otherwise, any person eighteen (18) years of age or over who violates subdivision (c)(2) by delivering" for "Delivering" and inserted "guilty of"; and deleted "and shall be fined an amount not exceeding fifteen thousand dollars (\$15,000)" following "Class B felony" in (c)(5).

RESEARCH REFERENCES

Ark. L. Rev. Case Note, Harbison v. State: Just Say No to a Usable Amount, 45 Ark. L. Rev. 425.

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Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

CASE NOTES

ANALYSIS

Constitutionality.
Bond.

Elements of offense.
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Substitution of noncontrolled substance.

Constitutionality.

Acts 1981, No. 78, which criminalized the possession, use, sale and manufacture of drug paraphernalia, and in pertinent part added subsection (c) of this section, is not unconstitutionally overbroad even though the act may prevent persons from utilizing the expressions imprinted on, or the symbolic speech represented by the use of, drug paraphernalia. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984); *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989).

Section 5-64-101(v) and subdivision (c)(1) of this section concerning the term "drug paraphernalia" are not unconstitutionally vague for want of "certainty" or "definiteness," since they give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988).

The drug paraphernalia law is not unconstitutionally vague, because the detailed definitions found in the statute give adequate notice of conduct constituting the offense. *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992).

Bond.

Because the appellate court affirmed the trial court's judgment convicting defendant of possession of drug paraphernalia with intent to manufacture and possession of a controlled substance, defendant's issue of bail pending appeal became moot and the appellate court did not have to decide moot issues; the appropriate and meaningful action that defendant could have taken would have been to petition the appellate court for a writ of certiorari separately challenging the trial court's denial of an appeal bond. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Elements of Offense.

Trial court did not err in failing to give lesser-included offense instruction because possession of pseudoephedrine with intent to manufacture methamphetamine under § 5-64-1102(a)(1) was not a lesser-included offense of possession of drug paraphernalia with intent to manufacture methamphetamine under subdivision (c)(5) of this section; subdivision (c)(5)

requires the intent to "use" the drug paraphernalia to manufacture methamphetamine, while § 5-64-1102(a)(1) does not and, therefore, the two statutes contain different elements. *Autrey v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 165 (Feb. 23, 2005).

Evidence.

Evidence held sufficient to support a conviction for possession of drug paraphernalia. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Ramey v. State*, 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Court erroneously precluded state from introducing evidence of officer concerning use of antenna, found on the defendant, as drug paraphernalia. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), supplemental op., remanded, on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991).

The trial evidence would have been sufficient to support defendant's conviction for possession of drug paraphernalia had the court allowed testimony from the officer concerning use of antenna, found on defendant, as drug paraphernalia, therefore, the case was remanded for retrial on the charge of possession of drug paraphernalia. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991).

Evidence of possession with intent to deliver a controlled substance (marijuana) and possession with intent to use drug paraphernalia held sufficient. *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994).

Evidence of possession of marijuana, possession of drug paraphernalia, and possession of an illicit whiskey still, found in defendant's residence, held sufficient. *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994).

In a prosecution for possession and delivery of a drug, erroneous admission of certain drug paraphernalia was harmless error where there was overwhelming evidence to support a conviction. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997); *Stephenson v. State*, 334 Ark. 520, 975 S.W.2d 830 (1998).

Evidence was sufficient to convict the defendant of possession of drug paraphernalia where the defendant possessed a cigar case in which methamphetamine and marijuana were hidden; the jury could have concluded that the case was used as a container to conceal controlled substances. *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001), cert. denied,

537 U.S. 815, 123 S. Ct. 82, 154 L. Ed. 2d 19 (2002).

Trial court properly denied defendant's motion for directed verdict on his convictions for possession of drug paraphernalia with intent to manufacture and possession of a controlled substance because the evidence sufficiently linked defendant to the contraband in that it showed that: (1) there was an operational methamphetamine lab in the kitchen of the shared residence; (2) numerous items used for the manufacture of crystal methamphetamine were seized from the residence; (3) drug paraphernalia was also found in a burn barrel near the residence and in the trash can on the back porch, indicating an ongoing drug manufacturing process; (4) the trash bags found on the side of the road alerted the drug task force to the existence of an illegal drug lab and included a receipt from a store that listed several items used to manufacture crystal methamphetamine that was traced to defendant; and (5) the jury was not required to believe defendant's statements regarding items found in his office and his denial of any knowledge of the contraband. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Where numerous items found were found in defendant's home that could be used in the manufacture of methamphetamine, including liquid fire, naphtha, lighter fluid, camp fuel, acetone, denatured alcohol, plastic bottles with rubber tubing attached, a Pyrex dish, and numerous plastic bags containing black crystal, two trash bags containing red powder, and a forensic chemist concluded that manufacturing of methamphetamine was taking place, the evidence was sufficient to sustain defendant's convictions for manufacturing methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine. *Weatherford v. State*, — Ark. App. —, — S.W.3d —, 2003 Ark. App. LEXIS 785 (Oct. 29, 2003), cert. denied, 541 U.S. 1053, 124 S. Ct. 2187, 158 L. Ed. 2d 750 (2004).

In a drug paraphernalia case, the evidence was insufficient to sustain defendant's conviction where police found no paraphernalia on defendant; rather, it was found some distance away from where defendant was stopped and there were no affirmative links between defen-

dant and the paraphernalia. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

Evidence was sufficient to sustain a drug paraphernalia possession conviction where the syringe in defendant's pocket was in close proximity to the methamphetamine found in the plastic bags behind his driver's seat. *Jones v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 352 (May 27, 2004).

Given that defendant owned the premises, that drugs and paraphernalia were found in common areas throughout the residence, and that methamphetamine and paraphernalia were found in his pocket, there was sufficient evidence whereby a jury could convict defendant of possession of drug paraphernalia with the intent to manufacture methamphetamine and of being an accomplice to drug crimes. *Lueken v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 857 (Nov. 17, 2004).

Evidence was sufficient to sustain defendant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine because defendant's control and knowledge of the drug could be inferred from the circumstances where (1) although defendant claimed he was burning his wife's methamphetamine lab, he knew it was a methamphetamine lab, (2) the wife testified that defendant manufactured methamphetamine on a regular basis and that he sold or traded the methamphetamine he produced, (3) items associated with the production of methamphetamine were scattered throughout defendant's house, some in plain view, and (4) defendant's hands were stained with iodine, an ingredient used in the manufacturing process. *Dodson v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 897 (Dec. 1, 2004).

Fraudulent Prescription.

In a prosecution for obtaining a controlled substance with a fraudulent prescription even though the substance in the prescription bottle was not chemically tested, testimony of a licensed pharmacist that he filled prescription bottle from his larger container of controlled substance was sufficient to sustain conviction. *Armstrong v. State*, 5 Ark. App. 96, 633 S.W.2d 51 (1982).

Possession.

Where contraband is discovered in jointly occupied premises and there is no

direct evidence that it belongs to a particular occupant, some additional factors must be present linking the accused to the contraband; the state must prove that the accused exercised care, control and management over the contraband. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

Search.

In a possession of drug paraphernalia with intent to manufacture and possession of a controlled substance case, the search warrant was valid and the trial court properly denied defendant's motion to suppress the evidence seized from the shared residence where: (1) the distinctive odor of a methamphetamine lab was a valid contributing factor in establishing probable cause for the warrant; (2) the search warrant was supported by more than mere conclusory statements; (3) the initial search of the residence was limited to the common area outside the residence where no warrant was required, and the search inside the residence was pursuant to a search warrant; (4) even if the landlord's statements were completely eliminated, there were still sufficient facts to support probable cause to search the residence; and (5) the partially incorrect address listed in the search warrant did not make the search warrant defective, especially since the affidavit correctly identified the residence and officer who had obtained the search warrant and had previously been to the residence would later,

himself, conduct the search. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Sentencing.

Felony convictions for the related offenses of possession of a controlled substance under § 5-64-401 and possession of drug paraphernalia under this section fall under two separate statutes and are not considered one offense for the purposes of sentencing under § 5-4-501. *McCullough v. State*, 44 Ark. App. 99, 866 S.W.2d 845 (1993).

Substitution of Noncontrolled Substance.

Evidence sufficient to support conviction of defendant who represented counterfeit pills to be amphetamines. *Honea v. State*, 15 Ark. App. 382, 695 S.W.2d 391 (1985).

Cited: *Adams v. State*, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980); *Finney v. State*, 3 Ark. App. 180, 623 S.W.2d 847 (1981); *Hawk v. State*, 38 Ark. App. 1, 826 S.W.2d 824 (1992); *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993); *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993); *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997); *Hyde v. State*, 59 Ark. App. 131, 953 S.W.2d 911 (1997); *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); *Wyatt v. State*, 75 Ark. App. 1, 54 S.W.3d 549 (2001).

5-64-404. Use of a communication device.

(a)(1) As used in this section, "communication device" means any public or private instrumentality used or useful in the transmission of a writing, sign, signal, picture, or sound of any kind.

(2) "Communication device" includes mail, telephone, wire, radio, and any other means of communication.

(b) A person commits the offense of use of a communication device if he or she knowingly uses any communication device in committing or in causing or facilitating the commission of any act constituting a:

(1) Felony under this chapter; or

(2) Felony inchoate offense under § 5-3-101 et seq. or this chapter.

(c) Each separate use of a communication device is a separate offense under this section.

(d) Any person who violates this section is guilty of a Class C felony.

History. Acts 1971, No. 590, Art. 4, § 4; A.S.A. 1947, § 82-2620; Acts 2005, No. 1994, § 305[B].

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections

designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2005 amendment rewrote this section.

5-64-405. Continuing criminal enterprise.

(a) A person commits the offense of engaging in a continuing criminal enterprise if he or she:

(1) Violates any provision of this chapter that is a felony, except § 5-64-401(c); and

(2) The violation is a part of a continuing series of two (2) or more felony offenses of this chapter, except § 5-64-401(c):

(A) That are undertaken by that person in concert with five (5) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management; and

(B) From which that person obtained substantial income or resources.

(b)(1) A person who engages in a continuing criminal enterprise is guilty of a felony and upon conviction shall be sentenced to a term of imprisonment up to two (2) times the term otherwise authorized for the underlying offense referenced in subdivision (a)(1) of this section and shall be fined an amount up to two (2) times that authorized for the underlying offense referenced in subdivision (a)(1) of this section.

(2) For any purpose other than disposition, engaging in a continuing criminal enterprise is a Class Y felony.

(c)(1) A person who violates subsection (a) of this section after a previous conviction under subsection (a) of this section has become final is guilty of a felony and shall be punished by a term of imprisonment not exceeding three (3) times that authorized for the underlying offense referenced in subdivision (a)(1) of this section and a fine not exceeding three (3) times the amount authorized for the underlying offense referenced in subdivision (a)(1) of this section.

(2) For any purpose other than disposition, engaging in a continuing criminal enterprise is a Class Y felony.

(d)(1) Upon conviction, the prosecuting attorney may institute a civil action against any person who violates this section to obtain a judgment against all persons who violates this section, jointly and severally, for damages in an amount equal to three (3) times the proceeds acquired by all persons involved in the enterprise or by reason of conduct in furtherance of the enterprise, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings.

(2) The standard of proof in an action brought under this section is a preponderance of the evidence.

(3) The procedures in the asset forfeiture law, § 5-64-505, shall apply.

(4) A defendant in a civil action brought under this subsection is entitled to a trial by jury.

(e) An offender found guilty of a violation of this section shall not:

- (1) Have his or her sentence suspended;
- (2) Be placed on probation;
- (3) Have imposition of sentence suspended;
- (4) Have the execution of the sentence;
- (5) Have the sentence deferred; or
- (6) Be eligible for § 16-93-301 et seq.

History. Acts 1971, No. 590, Art. 4, § 5; A.S.A. 1947, § 82-2621; Acts 2005, No. 1994, § 305[B].

designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections

Amendments. The 2005 amendment rewrote this section.

5-64-406. Distribution to minors — Enhanced penalties.

(a) Any person eighteen (18) years of age or over who violates § 5-64-401(a) by distributing a controlled substance listed in Schedule I or Schedule II that is a narcotic drug or methamphetamine to a person under eighteen (18) years of age who is at least three (3) years his or her junior is punishable by the fine authorized by § 5-64-401(a)(1), by a term of imprisonment of up to twice that authorized by § 5-64-401(a)(1), or by both.

(b) Any person eighteen (18) years of age or over who violates § 5-64-401 by distributing any other controlled substance listed in Schedule I, Schedule II, Schedule III, Schedule IV, or Schedule V to a person under eighteen (18) years of age who is at least three (3) years his junior is punishable by the fine authorized by § 5-64-401(a)(2), (3), or (4), by a term of imprisonment up to twice that authorized by § 5-64-401(a)(2), (3), or (4), or both.

History. Acts 1971, No. 590, Art. 4, § 6; A.S.A. 1947, § 82-2622; Acts 2005, No. 1994, § 475.

added the subsection (a) and (b) designations; and inserted "or methamphetamine" in (a).

Amendments. The 2005 amendment

5-64-407. Manufacture of methamphetamine in the presence of minors — Enhanced penalties.

(a) Any person who is found guilty of or who pleads guilty or nolo contendere to manufacture of methamphetamine, § 5-64-401(a)(1), or possession of drug paraphernalia with the intent to manufacture methamphetamine, § 5-64-403(c)(5), may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed:

(1) In the presence of a minor who may or may not be related to the person;

(2) With a minor in the same home or building where the methamphetamine was being manufactured or where the drug paraphernalia to

manufacture methamphetamine was in use or was in preparation to be used; or

(3) With a minor present in the same immediate area or in the same vehicle at the time of the person's arrest for the offense.

(b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person sentenced under this section is not eligible for early release on parole for the enhanced portion of the sentence.

(d) As used in this section, "minor" means any person under eighteen (18) years of age.

History. Acts 1971, No. 590, Art. 4, § 7; 1972 (Ex. Sess.), No. 67, § 3; 1973, No. 186, § 4; A.S.A. 1947, § 82-2623; Acts 1995, No. 998, § 2; 2005, No. 1994, § 304[B].

Publisher's Notes. As enacted, Acts

2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2005 amendment rewrote this section.

CASE NOTES

ANALYSIS

Applicability.
Delivery of marijuana.
Expungement.

Applicability.

The trial court correctly refused to accept the plea bargain for a drug related offense where the Uniform Controlled Substances Act did not expressly provide for probation. *Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993) (decision under prior law).

Delivery of Marijuana.

Delivery of marijuana is not a crime where either probation or suspension is available to the court for consideration as an appropriate sentence. *Whitener v. State*, 311 Ark. 377, 843 S.W.2d 853 (1992) (decision under prior law).

Where, at the time the offense was committed, this section, and former §§ 5-4-104(e)(1)(F) and 5-4-301(a)(1)(F) prohibited probation for delivery (as opposed to possession) of a controlled substance, the trial court erred in placing defendant on probation. *State v. Landis*, 315 Ark. 681, 870 S.W.2d 704 (1994); *State v. Galyean*, 315 Ark. 699, 870 S.W.2d 706 (1994) (decision under prior law).

Expungement.

A trial court does not have the power to expunge a defendant's record when defendant was not sentenced under one of the statutes, such as § 16-93-303(a)(1), § 16-93-502 (repealed), or this section, which specifically provide for expunging the record. *Shelton v. State*, 44 Ark. App. 156, 870 S.W.2d 398 (1994) (decision under prior law).

5-64-408. Subsequent convictions — Enhanced penalties.

(a) Any person convicted of a second or subsequent offense under this chapter shall be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to a narcotic drug, marijuana, depressant, stimulant, or a hallucinogenic drug.

(c) This section does not apply to an offense under § 5-64-401(c).

History. Acts 1971, No. 590, Art. 4, § 8; 1973, No. 186, § 5; A.S.A. 1947, § 82-2624; 2005, No. 1994, § 304[B].

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections

designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2005 amendment inserted "or her" in (b).

CASE NOTES

ANALYSIS

Cruel and unusual punishment.
Due process of law.
Equal protection.
Habitual criminals.
Sentencing.

Cruel and Unusual Punishment.

Doubling a sentence for a person convicted twice for a drug-related offense is not cruel and unusual punishment. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979).

Due Process of Law.

The defendant was not deprived of due process of law where circuit court, on defendant's conviction of possession of heroin with intent to deliver after his conviction of other drug offenses, patterned its procedures for fixing punishment after those provided in the habitual criminal act. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976).

Equal Protection.

This section in doubling of the normal penalty imposed for a drug violation upon a second conviction, does not violate the

right to equal protection of the laws because it authorizes a more severe punishment than that provided for in the general Habitual Offender Act. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979).

Habitual Criminals.

This section, which was enacted after § 5-4-501, does not preclude sentencing a habitual criminal under § 5-4-501. When two punishment statutes exist, a court is not prevented from using the more stringent provision. *Russell v. State*, 295 Ark. 619, 751 S.W.2d 334 (1988).

Sentencing.

If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, supreme court is not at liberty to reduce it even if court believes the sentence to be unduly harsh. *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990).

Cited: *Shackleford v. State*, 261 Ark. 721, 551 S.W.2d 205 (1977); *Sossamon v. State*, 31 Ark. App. 131, 789 S.W.2d 738 (1990); *Whitney v. State*, 326 Ark. 206, 930 S.W.2d 343 (1996).

5-64-409. [Repealed.]

Publisher's Notes. This section, concerning breaking or entering to steal a controlled substance, was repealed by Acts 2005, No. 1994, § 497. The section

was derived from Acts 1971, No. 590, Art. 4, § 9, as added by Acts 1972 (Ex. Sess.), No. 67, § 6; A.S.A. 1947, § 82-2624.1.

5-64-410. Penalties for delivery — Enhanced penalties.

(a)(1) Notwithstanding any other provision of law to the contrary:

(A) Any person convicted of delivering a controlled substance included in Schedule I shall be sentenced for a term of imprisonment of not less than ten (10) years; and

(B) Any person convicted of delivering a controlled substance included in Schedule I, Schedule II, Schedule III, Schedule IV, Schedule V, or Schedule VI to a school student in grade one through twelve (1-12) or any other person under eighteen (18) years of age

shall be sentenced for a term of imprisonment of not less than ten (10) years.

(2) A person over eighteen (18) years of age convicted of an offense defined in this subsection, except delivery of less than one ounce (1 oz.) of a Schedule VI controlled substance, is not eligible for early release on parole as provided in § 16-93-601.

(b) The provisions of this section are cumulative and supplemental to any other law of this state prescribing a penalty for delivery of a controlled substance and are deemed to modify only a law in direct conflict.

History. 2005, No. 1994, § 305[B].

Publisher's Notes. Former § 5-64-410, concerning enhanced penalties for distribution near a school or college, was repealed by Acts 1991, No. 864, § 2. The former section was derived from Acts

1989, No. 612, § 1. For present law, see § 5-64-411.

As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

5-64-411. Proximity to certain facilities — Enhanced penalties.

(a) Any person who commits an offense under § 5-64-401(a) by selling, delivering, possessing with intent to deliver, dispensing, manufacturing, transporting, administering, or distributing a controlled substance may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed on or within one thousand feet (1,000') of the real property of:

- (1) A city or state park;
 - (2) A public or private elementary or secondary school, public vocational school, or private or public college or university;
 - (3) A skating rink, Boys Club, Girls Club, YMCA, YWCA, or community or recreation center;
 - (4) A publicly funded and administered multifamily housing development;
 - (5) A drug or alcohol treatment facility;
 - (6) A day care center;
 - (7) A church; or
 - (8) A shelter as defined in § 9-4-102.
- (b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person convicted under this section is not eligible for early release on parole for the enhanced portion of the sentence.

(d)(1) Property covered by this section shall have a notice posted at the entrances to the property stating:

"THE SALE OF DRUGS UPON OR WITHIN ONE THOUSAND FEET (1000') OF THIS PROPERTY MAY SUBJECT THE SELLER OF THE DRUGS TO AN ADDITIONAL TEN (10) YEARS IMPRISONMENT IN ADDITION TO THE TERM OF IMPRISONMENT OTHERWISE PROVIDED FOR THE UNLAWFUL SALE OF DRUGS."

(2) However, the posting of the notice is not a necessary element for the enhancement of a sentence under this section.

(e) As used in this section, “recreation center” means a public place of entertainment consisting of various types of entertainment, including, but not limited to, billiards or pool, ping pong or table tennis, bowling, video games, pinball machines, or any other similar type of entertainment.

History. Acts 1989 (3rd Ex. Sess.), No. 88, § 1; 1991, No. 864, § 1; 1995, No. 778, § 1; 1995, No. 799, § 1; 1997, No. 1056, § 1; 2001, No. 1553, § 12; 2003, No. 1707, § 1; 2005, No. 195, § 1; 2005, No. 1994, § 305[B].

A.C.R.C. Notes. Pursuant to § 1-2-207, subsection (a) of this section is set out above as amended by Acts 1995, No. 799. Acts 1995, No. 778, amended subsection (a) of this section differently than Acts 1995, No. 799, as follows: “(a) Any person who commits an offense under § 5-64-401(a) selling, delivering, dispensing, transporting, administering, or distributing a controlled substance may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed on or within one thousand feet (1,000') of the real property of:

“(1) A city or state park;

“(2) A public or private elementary or

secondary school, public vocational school, or private or public college or university;

“(3) A skating rink, Boys Club, Girls Club, YMCA, YWCA, or a community or recreation center;

“(4) A publicly funded and administered multi-family housing development; or

“(5) A drug or alcohol treatment facility.

“(6) A publicly funded and administered housing development.”

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2001 amendment deleted (e) and redesignated the remaining subsection accordingly.

The 2003 amendment inserted “manufacturing” following “dispensing” in (a).

The 2005 amendment by No. 195 added (a)(8) and made a related change.

The 2005 amendment by No. 1994 deleted “or” in (a)(6).

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 14 UALR L.J. 753.
Survey of Legislation, 2003 Arkansas

General Assembly, Criminal Law, Controlled Substances, 26 UALR L.J. 366.

CASE NOTES

Cited: McCoy v. State, 326 Ark. 104, 929 S.W.2d 712 (1996).

5-64-412. Violations by public officials or law enforcement officers — Enhanced penalties.

(a) As used in this section:

(1) “Law enforcement officer” means any member of the Department of Arkansas State Police or the Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department and any other certified law enforcement officer employed full time by the State of Arkansas or any political subdivision of the State of Arkansas or court personnel in Arkansas; and

(2) “Public official” means any person holding or appointed to an elective office of state, county, or city government and any member of any board or commission of state, county, city, or local government including an improvement district or school district.

(b) Any public official or law enforcement officer who commits a felony violation of this chapter shall have any term of imprisonment imposed for the violation enhanced by a term not to exceed ten (10) years and a fine of not less than ten thousand dollars (\$10,000).

History. Acts 1989 (3rd Ex. Sess.), No. 80, §§ 1, 2; 2005, No. 1994, § 305[B].

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

Amendments. The 2005 amendment deleted "unless the context otherwise requires" at the end of (a); redesignated

former (c)(1) and (c)(2) as present (a)(2) and (a)(1) respectively; and substituted "this chapter" for "the Uniform Controlled Substances Act, §§ 64-101 through 5-64-600" in (b).

Cross References. Law enforcement agencies and programs, § 12-6-101 et seq.

Public officers and employees, § 21-1-101 et seq.

5-64-413. Probation — Discharge and dismissal.

(a) When any person who has not previously pleaded guilty or been found guilty of any offense under this chapter or under any statute of the United States or of any state relating to a narcotic drug, marijuana, stimulant, depressant, or a hallucinogenic drug pleads guilty to or is found guilty of possession of a controlled substance under § 5-64-401, with the exception of a conviction for possession of a substance listed under Schedule I, the court without entering a judgment of guilt and with the consent of the defendant may defer further proceedings and place the defendant on probation for a period of not less than one (1) year under such terms and conditions as may be set by the court.

(b) The court may require as a condition for probation that the defendant undergo an evaluative examination by a physician or medical facility approved by the court and, if warranted, undergo in-patient or out-patient treatment and rehabilitation for drug abuse.

(c) Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

(d)(1) Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him or her.

(2) Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for a second or subsequent conviction under § 5-64-408.

(3) There may be only one (1) discharge and dismissal under this section with respect to any person.

(4) A person against whom proceedings are discharged or dismissed may seek to have the criminal records sealed, consistent with the procedures established in § 16-90-901 et seq.

History. Acts 2005, No. 1994, § 305[B].

Publisher's Notes. Former § 5-64-413, concerning controlled substance analysis, was repealed by Acts 2005, No. 1994,

§ 305[B]. The section was derived from Acts 1989 (3rd Ex. Sess.), No. 83, § 1; 2001, No. 320, § 3[4]. For present provisions see § 5-64-414.

As enacted, Acts 2005, No. 1994, contained two sections designated as § 304. The two sections were subsequently designated § 304[A] and § 304[B].

5-64-414. Controlled substance analog.

(a)(1) “Controlled substance analog” means a substance:

(A) The chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or Schedule II or that has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or Schedule II; or

(2) With respect to a particular individual, that the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or Schedule II.

(2) “Controlled substance analog” does not include:

(A) A controlled substance;

(B) A substance for which there is an approved new drug application;

(C) A substance with respect to which an exemption is in effect for investigational use by a particular person under § 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, to the extent conduct with respect to the substance is pursuant to the exemption; or

(D) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(b) A controlled substance analog, to the extent intended for human consumption, is treated for the purposes of this chapter as a substance included in Schedule I.

(c) Within ten (10) days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the prosecuting attorney shall notify the Director of the Division of Health of the Department of Health and Human Services of information relevant to emergency scheduling as provided for in § 5-64-201(d).

(d) After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may continue or take place.

History. Acts 1989 (3rd Ex. Sess.), No. 84, § 1; 2005, No. 1994, § 306.

Amendments. The 2005 amendment rewrote this section.

CASE NOTES

ANALYSIS

Constitutionality.

Elements.

Position of management.

Sentencing.

Constitutionality.

The language “two or more felony ofenses” is sufficiently clear to survive a vagueness challenge. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993) (decision under prior law).

There is no fatal vagueness problem in the requirement that a criminal enterprise defendant must have received "substantial income or resources" from his or her activity. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993) (decision under prior law).

Simultaneous conviction and sentence for continuing criminal enterprise and its predicate felony offenses do not violate the protection against multiple punishments for the same offense afforded by the federal and Arkansas constitutional double jeopardy clauses, U.S. Const. Amend. 5 and Ark. Const., Art. 5, § 8. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995) (decision under prior law).

Elements.

In order to prove the continuing criminal enterprise offense under this section, one of the necessary elements is that the defendant committed "two or more felony offenses" which are part of the Controlled

Substances Act. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993) (decision under prior law).

Position of Management.

The management element is established by demonstrating that the defendant exerted some type of influence over another individual as exemplified by that individual's compliance with the defendant's directions, instruction, or terms. *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992) (decision under prior law).

Sentencing.

Based on examination of this section and on § 5-1-110 as amended by Acts 1995, No. 595, the General Assembly intended to authorize separate punishments for violations of this section and the underlying substantive predicate offenses. *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (1995) (decision under prior law).

5-64-415. Drug precursors.

(a) DEFINITION.

(1) "Drug precursor" means any substance, material, compound, mixture, or preparation listed in rules and regulations promulgated or adopted pursuant to this section or any of their salts or isomers.

(2) "Drug precursor" specifically excludes those substances, materials, compounds, mixtures, or preparations that:

(A) Are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance that is generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., as amended; or

(B) Have been manufactured, distributed, or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of § 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, as amended.

(b) AUTHORITY TO CONTROL DRUG PRECURSORS BY RULE AND REGULATION.

(1)(A) The Division of Health of the Department of Health and Human Services shall promulgate by rule and regulation a list of drug precursors, comprised of any substance, material, compound, mixture, or preparation or any of their salts or isomers that are drug precursors.

(B) The Division of Health of the Department of Health and Human Services may add substances to, delete substances from, and reschedule substances listed in the drug precursors list pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(2) In making a determination regarding a substance to be placed on the drug precursor list, the Division of Health of the Department of Health and Human Services shall consider the following:

(A) Whether the substance is an immediate precursor of a controlled substance;

(B) The actual or relative potential for abuse;

(C) The scientific evidence of the substance's pharmacological effect, if known;

(D) The state of current scientific knowledge regarding the substance or the controlled substance for which it is a precursor;

(E) The history and current pattern of abuse of the controlled substance for which the substance is a precursor;

(F) The scope, duration, and significance of abuse of the controlled substance for which the substance is a precursor;

(G) The risk to the public health; and

(H) The potential of the substance or the controlled substance to produce psychic or physiological dependence liability.

(3) The Division of Health of the Department of Health and Human Services may consider findings of the United States Food and Drug Administration or the United States Drug Enforcement Administration as prima facie evidence relating to one (1) or more of the factors listed in subdivision (b)(2) of this section in connection with the Division of Health of the Department of Health and Human Services' determination.

(4)(A) After considering the factors enumerated in subdivision (b)(2) of this section, the Division of Health of the Department of Health and Human Services shall make findings with respect to the factors and shall promulgate a rule controlling a substance as a drug precursor upon a finding that the substance has a potential for abuse.

(B) If the Division of Health of the Department of Health and Human Services designates a substance as an immediate drug precursor, a substance that is a precursor of the controlled precursor is not subject to control solely because it is a precursor of the controlled precursor.

(5) Authority to control under this section does not extend to an alcoholic beverage, or alcoholic liquor, a fermented malt beverage, or tobacco.

(c) LICENSE REQUIRED — CONTROLLED SUBSTANCES DRUG PRECURSORS.

(1)(A) The Division of Health of the Department of Health and Human Services may promulgate regulations and charge reasonable fees of not more than twenty-five dollars (\$25.00) relating to the licensing and control of the manufacture, possession, transfer, and transportation of a drug precursor.

(B)(i) The fees established under this subsection shall be collected by the Division of Health of the Department of Health and Human Services and transmitted to the Treasurer of State, who shall credit the fees to the Health Department Drug Precursor Cash Fund, which fund is created by this section.

(ii) The fund shall be administered by the Division of Pharmacy Services and Drug Control of the Division of Health of the Department of Health and Human Services.

(2) Any person that manufactures, possesses, transfers, or transports any drug precursor or that proposes to engage in the manufacture, possession, transfer, or transportation of any drug precursor shall annually obtain a license issued by the Division of Health of the Department of Health and Human Services.

(3) A person licensed by the Division of Health of the Department of Health and Human Services to manufacture, possess, transfer, or transport a drug precursor may manufacture, possess, transfer, or transport the drug precursor to the extent authorized by the person's license and in conformity with any other provision of law.

(4) The following persons are not required to be licensed under this subsection and may lawfully possess a drug precursor:

(A) A physician, dentist, pharmacist, veterinarian, or podiatrist;

(B) An agent of any manufacturer, or wholesaler of any drug precursor if the agent is acting in the usual course of his or her principal's business or employment;

(C) An employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(D) A student enrolled in a college chemistry class for credit if the student's use of the drug precursor is for a bona fide educational purpose and the educational institution otherwise possesses all the necessary licenses required by the Division of Health of the Department of Health and Human Services;

(E) An officer or employee of an appropriate agency of federal, state, or local government and a law enforcement agency acting pursuant to its official duties; and

(F) Any researcher, including an analytical laboratory, experimenting with, studying, or testing any drug analog that is licensed by the Division of Health of the Department of Health and Human Services pursuant to the requirements of this subsection.

(d) **WAIVER.** The Division of Health of the Department of Health and Human Services may waive by regulation the requirement for licensing of certain manufacturers if the waiver is consistent with the public health and safety.

(e) **ISSUANCE OF LICENSE — FEES.**

(1)(A) The Division of Health of the Department of Health and Human Services shall license an applicant to manufacture, possess, transfer, or transport a drug precursor unless it determines that the issuance of the license would be inconsistent with the public interest.

(B) In determining the public interest, the Division of Health of the Department of Health and Human Services shall consider the following factors:

(i) Maintenance of effective controls against diversion of a drug precursor other than a legitimate medical, scientific, or industrial channel;

(ii) Compliance with applicable state and local law;

(iii) Any conviction of the applicant under federal or state law relating to any controlled substance or drug precursor;

(iv) Past experience in the manufacture, possession, transfer, or transportation of a drug precursor and the existence in the applicant's establishment of effective controls against diversion;

(v) Furnishing by the applicant of false or fraudulent material in any application filed under subsection (c) of this section;

(vi) Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense a controlled substance or drug precursor authorized by federal law; and

(vii) Any other factor relevant to and consistent with the public health and safety.

(2) Licensing under this section does not entitle a licensee to manufacture, possess, transfer, or transport a drug precursor other than a drug precursor allowed in the license.

(f) DENIAL, REVOCATION, OR SUSPENSION OF LICENSE.

(1) The Division of Health of the Department of Health and Human Services may deny, revoke, or suspend a license issued pursuant to subsection (c) of this section for any of the following reasons:

(A) If a licensee is convicted of, or has accepted by a court a plea of guilty or nolo contendere to a felony under any state or federal law relating to a controlled substance or a drug precursor;

(B)(i) If a licensee has its federal registration to manufacture, conduct research on, distribute, or dispense a controlled substance or a drug precursor suspended or revoked.

(ii) The Division of Health of the Department of Health and Human Services may limit revocation or suspension of a license to the particular controlled substance or drug precursor that was the basis for revocation or suspension; or

(C) If a licensee commits an unlawful act as enumerated in subsection (g) of this section.

(2)(A)(i) When the Division of Health of the Department of Health and Human Services suspends or revokes a license, any controlled substance or drug precursor owned or possessed by the licensee at the time of the suspension or on the effective date of the revocation order may be placed under seal.

(ii) No disposition may be made of a controlled substance or drug precursor under seal until the time for making an appeal has elapsed or until all appeals have been concluded unless a court orders otherwise or orders the sale of any perishable controlled substance or drug precursor and the deposit of the proceeds with the court.

(B) Upon a revocation order becoming final:

(i) Any controlled substance and any drug precursor may be forfeited to the Division of Health of the Department of Health and Human Services;

(ii) Any expense of disposing of a forfeited controlled substance or drug precursor shall be borne by the licensee;

(iii) The court may order the licensee to pay a reasonable sum of money to the Division of Health of the Department of Health and Human Services to cover the expenses of disposition; and

(iv) The Division of Health of the Department of Health and Human Services may seek enforcement of the order of payment, or reimbursement for any expenses through any lawful means.

(g) UNLAWFUL ACTS — LICENSES — PENALTIES.

(1) It is unlawful to:

(A) Knowingly transfer a drug precursor except to an authorized licensee;

(B) Knowingly use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended, or issued to another person;

(C) Knowingly acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception, or subterfuge;

(D) Knowingly furnish false or fraudulent material information in, or omitting any material information from, any application, report, or other document required to be kept or filed under this section or any record required to be kept by this section;

(E) Have knowledge of the manufacture of a drug precursor not authorized by a licensee's license, or have knowledge of the transfer of a drug precursor not authorized by the licensee's license to another licensee or authorized person;

(F) Refuse entry into any premises for any inspection authorized by this section; or

(G) Manufacture, possess, transfer, or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the Division of Health of the Department of Health and Human Services.

(2) Any person who violates a provision of this subsection is guilty of a Class D felony.

(h) RECORDS TO BE KEPT — ORDER FORMS.

(1) A manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes any drug precursor to a person shall make an accurate and legible record of the transaction and maintain the record for a period of at least two (2) years after the date of the transaction.

(2) Before selling, transferring, or otherwise furnishing to a person in this state a precursor substance subject to subdivision (h)(1) of this section, a manufacturer, wholesaler, retailer, or other person shall:

(A) If the recipient does not represent a business, obtain from the recipient:

(i) The recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing address, other than a post office box number, from a driver's license

or personal identification card issued by the Department of Finance and Administration that contains a photograph of the recipient;

(ii) The year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(iii) A complete description of how the substance is to be used; and

(iv) The recipient's signature;

(B) If the recipient represents a business, obtain from the recipient:

(i) A letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code, and telephone number, and a complete description of how the substance is to be used; and

(ii) The recipient's signature; and

(C) For any recipient, sign as a witness to the signature and identification of the recipient.

(3)(A) Except as otherwise provided in this section, a manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes to a person in this state a drug precursor shall submit to the Division of Health of the Department of Health and Human Services, at least twenty-one (21) days before the delivery of the drug precursor, a report of the transaction on a form obtained from the Division of Health of the Department of Health and Human Services that includes the information required by subdivisions (h)(2)(A) or (B) of this section.

(B) A copy of this report shall be transmitted to the Department of Arkansas State Police.

(i) REPORTS OF THEFT, LOSS, SHIPPING DISCREPANCIES, AND OTHER TRANSACTIONS.

(1) The theft or loss of any drug precursor discovered by any person regulated by this section shall be reported to the Division of Health of the Department of Health and Human Services and the Department of Arkansas State Police within three (3) days after the discovery.

(2)(A) Any difference between the quantity of any drug precursor received and the quantity shipped shall be reported to the Division of Health of the Department of Health and Human Services within three (3) days after the receipt of actual knowledge of the discrepancy.

(B) When applicable, any report made pursuant to this subsection shall also include the name of any common carrier or person that transported the substance and the date of shipment of the substance.

(3) Any manufacturer, wholesaler, retailer, or other person subject to any other reporting requirement in this section that receives from a source outside of this state any drug precursor specified in rules and regulations promulgated pursuant to this section shall submit a report of the transaction to the Division of Health of the Department of Health and Human Services in accordance with rules adopted by the Division of Health of the Department of Health and Human Services.

(4) Any person violating any provision of this subsection is guilty of a Class A misdemeanor.

(5) The Division of Health of the Department of Health and Human Services may authorize a manufacturer, wholesaler, retailer, or other

person to submit a comprehensive monthly report instead of the report required by subdivision (i)(2)(A) of this section if the Director of the Division of Health of the Department of Health and Human Services determines that:

(A) There is a pattern of regular supply and purchase of the drug precursor between the furnisher and the recipient; or

(B) The recipient has established a record of utilization of the drug precursor solely for a lawful purpose.

(j) INVESTIGATIONS AND INSPECTIONS.

(1) The Department of Arkansas State Police specifically may investigate any violation of a provision of this section, and enforce its provisions.

(2) Further, the Department of Arkansas State Police and the Division of Health of the Department of Health and Human Services are authorized and directed to exchange information gathered or received by either agency under the provisions of this section.

(3) Any record kept by a licensee pursuant to this section is open to inspection by an authorized investigator of the Department of Arkansas State Police or the Division of Health of the Department of Health and Human Services during normal business hours and at any other reasonable time.

(k) In addition to rules and regulations authorized by a provision of this section, the Division of Health of the Department of Health and Human Services may promulgate necessary rules and regulations to carry out the provisions of this section.

History. Acts 1991, No. 954, §§ 1, 3, 4.

A.C.R.C. Notes. As enacted by Acts 1991, No. 954, § 1, subdivision (i)(3) be-

gan: "On or after the effective date of this act." The effective date of Acts 1991, No. 954, was July 15, 1991.

5-64-416. [Repealed.]

Publisher's Notes. This section, concerning assessment of fee upon conviction or probation was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995

(1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1991, No. 1061, § 1.

5-64-417. Penalties under other laws.

Any penalty imposed for a violation of this chapter is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law.

History. Acts 1991, No. 1145, §§ 1, 2; 2005, No. 1994, § 307.

Publisher's Notes. The 2005 amendment rewrote this section.

5-64-418. Foreign conviction.

If a violation of this chapter is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

History. Acts 2001, No. 1141, § 1; 2005, No. 1994, § 307.

Amendments. The 2005 amendment rewrote this section.

SUBCHAPTER 5 — UNIFORM CONTROLLED SUBSTANCES ACT — ENFORCEMENT AND ADMINISTRATION

SECTION.

- 5-64-501. Powers of officials generally.
- 5-64-502. Issuance and execution of administrative inspection warrants.
- 5-64-503. Injunctions or restraining orders.
- 5-64-504. Intergovernmental cooperation — Identities of patients and research subjects.
- 5-64-505. Property subject to forfeiture —

SECTION.

- Procedure — Disposition of property.
- 5-64-506. Burden of proof — Liability of officers.
- 5-64-507. Conclusiveness of findings.
- 5-64-508. Prevention and deterrence — Educational and research programs.
- 5-64-509. [Repealed.]

A.C.R.C. Notes. Acts 1989 (3rd Ex. Sess.), No. 87, § 5, provided: “(a) Civil seizures or forfeitures and injunctive proceedings commenced before the effective date of this act are not affected by this act.

“(b) This section applies to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations which occur following its effective date.”

Acts 1989 (3rd Ex. Sess.), No. 87, § 6, provided: “Any orders and rules adopted under any law affected by this act and in effect on the effective date of this act and not in conflict with this act continue in effect until modified, superseded, or repealed.”

Publisher’s Notes. Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

Effective Dates. Acts 1972 (Ex. Sess.), No. 67, § 9: Mar. 6, 1972. Emergency clause provided: “It is hereby found and determined by the General Assembly that there is considerable confusion regarding the application and effect of Act 590 of 1971; that the penalties prescribed in Act 590 are in need of clarification; that the

problem of drug abuse in this State is increasing at an alarming rate and that additional provisions are needed to assist in the enforcement of the provisions of Act 590; and that this Act is immediately necessary to provide such clarification and enforcement procedures for the protection of the public health and safety and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1981, No. 78, § 7: became law without Governor’s signature. Noted Feb. 15, 1981. Emergency clause provided: “It is hereby found and determined by the General Assembly that there is an increasing problem of drug abuse in the State of Arkansas and that in order to protect the public health and safety immediate steps must be taken to enact a comprehensive Drug Paraphernalia Act and the immediate passage of this Act is necessary to accomplish this purpose; therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force from and after its passage and approval.”

Acts 1983, No. 787, § 10: Mar. 24, 1983. Emergency clause provided: “It is hereby found and determined by the General Assembly that there is an increasing prob-

lem of counterfeit substances in the State of Arkansas and that in order to protect the public health and safety, immediate steps must be taken to establish a system of punishment for those possessing or distributing such substances. Therefore, an

emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

CASE NOTES

In General.

This subchapter is remedial. Sims v.

State, 326 Ark. 296, 930 S.W.2d 381 (1996).

5-64-501. Powers of officials generally.

Any law enforcement officer, any person authorized to enforce this chapter, or any employee of the Department of Health and Human Services designated by the Director of the Division of Health of the Department of Health and Human Services to conduct an examination, investigation, or inspection under this chapter relating to a controlled substance or to a counterfeit drug may:

- (1) Carry a firearm in the performance of his or her official duties;
- (2) Execute and serve a search warrant, arrest warrant, administrative inspection warrant, subpoena, or summons issued under the authority of this state;
- (3) Make an arrest without warrant for any offense under this chapter committed in his or her presence, or if he or she has probable cause to believe that the person to be arrested has committed a violation of this chapter that may constitute a felony;
- (4) Make a seizure of property pursuant to this chapter; or
- (5) Perform any other law enforcement duty as the director designates.

History. Acts 1971, No. 590, Art. 5, § 1; 1972 (Ex. Sess.), No. 67, § 5; 1979, No. 898, § 14; A.S.A. 1947, § 82-2625; Acts 2005, No. 1994, § 308.

Publisher's Notes. Acts 1972 (Ex. Sess.), No. 67, § 4, provided that nothing in Acts 1972 (Ex. Sess.), No. 67, which amended various provisions of Acts 1971, No. 590, was to limit or to be construed as limiting or restricting the investigatory,

inspection, or disciplinary powers of any licensing and disciplining board authorized by law.

Amendments. The 2005 amendment deleted "subchapters 1-6 of" preceding "this chapter" throughout this section.

Cross References. Authority to investigate and arrest in contiguous county, § 12-12-102.

CASE NOTES

Cited: Hosto v. Brickell, 265 Ark. 147, 577 S.W.2d 401 (1979).

5-64-502. Issuance and execution of administrative inspection warrants.

(a) Issuance and execution of an administrative inspection warrant shall be as follows:

(1)(A) A judge of a court of record, within his or her jurisdiction, and upon proper oath or affirmation showing probable cause, may issue a warrant for the purpose of conducting an administrative inspection authorized by this chapter or a rule under this chapter, and a seizure of property appropriate to the administrative inspection.

(B) For purposes of the issuance of an administrative inspection warrant, probable cause exists from showing a valid public interest in the effective enforcement of this chapter or a rule under this chapter, sufficient to justify administrative inspection of the area, premises, building, or conveyance in the circumstances specified in the application for the administrative inspection warrant;

(2)(A) An administrative inspection warrant shall issue only upon an affidavit of a designated officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate, and establishing the grounds for issuing the administrative inspection warrant.

(B) If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he or she shall issue an administrative inspection warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any.

(C) The administrative inspection warrant shall:

(i) State the grounds for its issuance and the name of each person whose affidavit has been taken in support of it;

(ii) Be directed to a person authorized by § 5-64-501 to execute it;

(iii) Command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(iv) Identify the item or types of property to be seized, if any; and

(v) Direct that it be served during normal business hours and designate the judge or magistrate to whom it shall be returned;

(3)(A) An administrative inspection warrant issued pursuant to this section shall be executed and returned within ten (10) days of its date unless, upon a showing of a need for additional time, the court orders otherwise.

(B) If property is seized pursuant to an administrative inspection warrant, a copy of the administrative inspection warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken.

(C)(i) The return of the administrative inspection warrant shall be made promptly, accompanied by a written inventory of any property taken.

(ii) The inventory shall be made in the presence of the person executing the administrative inspection warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one (1) credible person other than the person executing the administrative inspection warrant.

(iii) A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the administrative inspection warrant; and

(4) The judge or magistrate who has issued an administrative inspection warrant shall attach to it a copy of the return and any paper returnable in connection with it and file the administrative inspection warrant, the copy of the return, and any paper returnable in connection with the administrative inspection warrant with the circuit clerk of the county where the inspection was made.

(b) The Arkansas Drug Director may make an administrative inspection of controlled premises in accordance with the following provisions:

(1) As used in this section, "controlled premises" means:

(A) A place where a person is required by state law to keep records; and

(B) A place including a factory, warehouse, establishment, or conveyance where a person registered or exempted from registration requirements under this chapter is permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance;

(2) When authorized by an administrative inspection warrant issued pursuant to subsection (a) of this section an officer or employee designated by the director, upon presenting the administrative inspection warrant and appropriate credentials to the owner, operator, or agent in charge, may enter controlled premises for the purpose of conducting an administrative inspection;

(3) When authorized by an administrative inspection warrant, an officer or employee designated by the director may:

(A) Inspect and copy a record required by this chapter to be kept;

(B) Inspect, within reasonable limits and in a reasonable manner, controlled premises and any pertinent equipment, finished and unfinished material, container or labeling found in the controlled premises, and, except as provided in subdivision (b)(5) of this section, any other thing in the controlled premises, including a record, file, paper, process, control, or facility bearing on a violation of this chapter; and

(C) Inventory any stock of any controlled substance in the controlled premises and obtain samples of the stock of any controlled substance;

(4) This section does not prevent the inspection without an administrative inspection warrant of a book or record pursuant to an administrative subpoena, nor does it prevent an entry or an administrative inspection, including a seizure of property, without an administrative inspection warrant:

(A) If the owner, operator, or agent in charge of the controlled premises consents;

(B) In a situation presenting imminent danger to health or safety;

(C) In a situation involving inspection of a conveyance if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain an administrative inspection warrant;

(D) In any other exceptional or emergency circumstance when time or opportunity to apply for an administrative inspection warrant is lacking; or

(E) In any other situation in which an administrative inspection warrant is not constitutionally required; and

(5) An inspection authorized by this section does not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.

History. Acts 1971, No. 590, Art. 5, § 2; A.S.A. 1947, § 82-2626; Acts 2005, No. 1994, § 308.

Amendments. The 2005 amendment

deleted “subchapters 1-6 of” preceding “this chapter” twice in (a)(1), and in (b)(1)(B), (b)(3)(A) and (b)(3)(B); and made stylistic changes throughout.

CASE NOTES

Construction.

This section must be read as an act authorizing administrative inspection warrants and regulating their issuance and execution when constitutionally re-

quired, and not as a limitation on actions where a warrant is not required. *Hosto v. Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979).

5-64-503. Injunctions or restraining orders.

(a) A trial court of this state may exercise jurisdiction to restrain or enjoin a violation of this chapter.

(b) The defendant may demand a trial by jury for an alleged violation of an injunction or restraining order under this section.

History. Acts 1971, No. 590, Art. 5, § 3; A.S.A. 1947, § 82-2627.

5-64-504. Intergovernmental cooperation — Identities of patients and research subjects.

(a)(1) The Director of the Division of Health of the Department of Health and Human Services shall cooperate with federal and any other state agency in discharging the agency’s responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances.

(2) To this end, the director may:

(A) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(B) Coordinate and cooperate in training programs concerning controlled substance law enforcement at local and state levels;

(C)(i) Cooperate with the United States Drug Enforcement Administration by establishing a centralized unit to accept, catalogue, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within the state and make the information available for federal, state, and local law enforcement purposes.

(ii) The director shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under subsection (c) of this section; and

(D) Conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

(b) Results, information, and evidence received from the United States Drug Enforcement Administration relating to the regulatory functions of this chapter, including a result of an inspection conducted by the United States Drug Enforcement Administration, may be relied and acted upon by the director in the exercise of the Division of Health of the Department of Health and Human Services' regulatory functions under this chapter.

(c) A practitioner engaged in medical practice or research is not required or compelled to furnish the name or identity of a patient or research subject to the director nor may he or she be compelled in any state or local civil, criminal, administrative, legislative, or other proceeding to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

History. Acts 1971, No. 590, Art. 5, § 4; inserted "or she" in (a), (a)(3), and (c); and A.S.A. 1947, § 82-2628; Acts 2005, No. deleted "subchapters 1-6 of" preceding 1994, § 309. "this chapter" twice in (b).

Amendments. The 2005 amendment

5-64-505. Property subject to forfeiture — Procedure — Disposition of property.

(a) **ITEMS SUBJECT TO FORFEITURE.** The following are subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney and when so ordered by the circuit court in accordance with this section, however no property is subject to forfeiture based solely upon a misdemeanor possession of a Schedule III, Schedule IV, Schedule V, or Schedule VI controlled substance:

(1) Any controlled substance or counterfeit substance that has been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(2) Any raw material, product, or equipment of any kind that is used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or counterfeit substance in violation of this chapter;

(3) Any property that is used, or intended for use, as a container for property described in subdivision (a)(1) or (2) of this section;

(4)(A) Any conveyance, including an aircraft, vehicle, or vessel, that is used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in subdivision (a)(1) or (2) of this section, however:

(A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in

charge of the conveyance is a consenting party or privy to a violation of this chapter;

(B)(i) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent.

(ii) Upon a showing described in subdivision (a)(4)(B)(i) by the owner or interest holder, the conveyance may nevertheless be forfeited if the prosecuting attorney establishes that the owner or interest holder either knew or should reasonably have known that the conveyance would be used to transport or in any manner to facilitate the transportation, for the purpose of sale or receipt, of property described in subdivision (a)(1) or (2) of this section;

(C) A conveyance is not subject to forfeiture for a violation of § 5-64-401(c); and

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission;

(5) Any book, record, or research product or material, including a formula, microfilm, tape, or data that is used, or intended for use, in violation of this chapter;

(6)(A) Anything of value furnished or intended to be furnished in exchange for a controlled substance or counterfeit substance in violation of this chapter, any proceeds or profits traceable to the exchange, and any money, negotiable instrument, or security used, or intended to be used, to facilitate any violation of this chapter.

(B) However, no property shall be forfeited under this subdivision (a)(6) to the extent of the interest of an owner by reason of any act or omission established by him or her, by a preponderance of the evidence, to have been committed or omitted without his or her knowledge or consent;

(7) REBUTTABLE PRESUMPTIONS.

(A) Any money, coin, or currency found in close proximity to a forfeitable controlled substance, a counterfeit substance, forfeitable drug manufacturing or distributing paraphernalia, or a forfeitable record of an importation, manufacture, or distribution of a controlled substance or counterfeit substance is presumed to be forfeitable under this subdivision (a)(7).

(B) The burden of proof is upon a claimant of the property to rebut this presumption by a preponderance of the evidence; and

(8) Real property may be forfeited under this chapter if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by this chapter, however:

(A) No real property is subject to forfeiture under this chapter by reason of any act or omission established by the owner of the real property by a preponderance of the evidence to have been committed or omitted without his or her knowledge or consent;

(B) Real property is not subject to forfeiture for a violation of § 5-64-401(c);

(C) A forfeiture of real property encumbered by a mortgage or other lien is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the unlawful act or omission;

(D) Upon conviction, when the circuit court having jurisdiction over the real property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this section, the court shall enter an order consistent with subsection (h) of this section;

(E) When any court orders a forfeiture of real property pursuant to this chapter, the order shall be filed of record on the day issued and shall have prospective effect only;

(F) A forfeiture of real property ordered under a provision of this chapter does not affect the title of a bona fide purchaser who purchased the real property prior to the issuance of the order, and the order has no force or effect on the title of the bona fide purchaser; and

(G) Any lis pendens filed in connection with any action pending under a provision of this chapter that might result in the forfeiture of real property is operative only from the time filed and has no retroactive effect.

(b) SEIZURE AND SUMMARY FORFEITURE OF CONTRABAND. The following items are deemed contraband and may be seized and summarily forfeited to the state:

(1) A controlled substance listed in Schedule I that is possessed, transferred, sold, or offered for sale in violation of this chapter and a controlled substance listed in Schedule I that is seized or comes into the possession of the state and the owner of the controlled substance is unknown;

(2)(A) A species of a plant from which a controlled substance in Schedule I, Schedule II, or Schedule VI may be derived and:

(i) The plant has been planted or cultivated in violation of this chapter;

(ii) The plant's owner or cultivator is unknown; or

(iii) The plant is a wild growth.

(B) Upon demand by a seizing law enforcement agency, the failure of a person in occupancy or in control of land or premises where the species of plant is growing or being stored, to produce an appropriate registration or proof that he or she is the holder of an appropriate registration, constitutes authority for the seizure and forfeiture of the plant; and

(3) Any drug paraphernalia or counterfeit substance except in the possession or control of a practitioner in the course of professional practice and/or research.

(c) SEIZURE OF PROPERTY. Property subject to forfeiture under this chapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the property on

petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(3) The seizing law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The seizing law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(d) TRANSFER OF PROPERTY SEIZED BY STATE OR LOCAL AGENCY TO FEDERAL AGENCY.

(1) No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal entity for forfeiture under federal law unless the circuit court having jurisdiction over the property enters an order, upon petition by the prosecuting attorney, authorizing the property to be transferred to the federal entity.

(2) The transfer shall not be approved unless it reasonably appears that the activity giving rise to the investigation or seizure involves more than one (1) state or the nature of the investigation or seizure would be better pursued under federal law.

(e) CUSTODY OF PROPERTY PENDING DISPOSITION.

(1) Property seized for forfeiture under this section is not subject to replevin, but is deemed to be in the custody of the seizing law enforcement agency subject only to an order or decree of the circuit court having jurisdiction over the property seized.

(2) Subject to any need to retain the property as evidence, when property is seized under this chapter the seizing law enforcement agency may:

(A) Remove the property to a place designated by the circuit court;

(B) Place the property under constructive seizure posting notice of pending forfeiture on it, by giving notice of pending forfeiture to its owners and interest holders, or by filing notice of pending forfeiture in any appropriate public record relating to the property;

(C) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, or is not needed for evidentiary purposes, deposit it in an interest-bearing account; or

(D) Provide for another agency or custodian, including an owner, secured party, mortgagee, or lienholder, to take custody of the property and service, maintain, and operate it as reasonably necessary to maintain its value in any appropriate location within the jurisdiction of the court.

(3)(A) In any case of transfer of property, a transfer receipt shall be prepared by the transferring agency.

(B) The transfer receipt shall:

(i) List a detailed and complete description of the property being transferred;

(ii) State to whom the property is being transferred and the source or authorization for the transfer; and

(iii) Be signed by both the transferor and the transferee.

(C) Both transferor and transferee shall maintain a copy of the transfer receipt.

(4) A person who acts as custodian of property under this section is not liable to any person on account of an act done in a reasonable manner in compliance with an order under this chapter.

(f) INVENTORY OF PROPERTY SEIZED — REFERRAL TO PROSECUTING ATTORNEY.

(1) Any property seized by a state or local law enforcement officer who is detached to, deputized or commissioned by, or working in conjunction with a federal agency remains subject to the provisions of this section.

(2)(A) When property is seized for forfeiture by a law enforcement agency, the seizing law enforcement officer shall prepare and sign a confiscation report.

(B)(i) The party from whom the property is seized shall also sign the confiscation report if present and shall immediately receive a copy of the confiscation report.

(ii) If the party refuses to sign the confiscation report, the confiscation report shall be signed by one (1) additional law enforcement officer, stating that the party refused to sign the confiscation report.

(C) The original confiscation report shall be:

(i) Filed with the seizing law enforcement agency within forty-eight (48) hours after the seizure; and

(ii) Maintained in a separate file.

(D) One (1) copy of the confiscation report shall be retained by the seizing law enforcement officer.

(3) The confiscation report shall contain the following information:

(A) A detailed description of the property seized including any serial or model numbers;

(B) The date of seizure;

(C) The name and address from whom the property was seized;

(D) The reason for the seizure;

(E) Where the property will be held;

(F) The seizing law enforcement officer's name; and

(G) A signed statement by the seizing law enforcement officer stating that the confiscation report is true and complete.

(4) Within three (3) business days of receiving the confiscation report, the seizing law enforcement agency shall forward a copy of the confiscation report to the prosecuting attorney for the district where the property was seized and to the Arkansas Drug Director.

(5)(A) The Division of Legislative Audit shall notify the Arkansas Alcohol and Drug Abuse Coordinating Council and a circuit court in the county of a law enforcement agency, prosecuting attorney, or

other public entity that the law enforcement agency, prosecuting attorney, or public entity is ineligible to receive any forfeited funds, forfeited property, or any grants from the council, if the Division of Legislative Audit determines, by its own investigation or upon written notice from the Arkansas Drug Director, that:

(i) The law enforcement agency has failed to complete and file the confiscation reports as required by this section;

(ii) The law enforcement agency, prosecuting attorney, or public entity has not properly accounted for any seized property; or

(iii) The prosecuting attorney has failed to comply with the notification requirement set forth in subdivision (i)(1) of this section.

(B) After the notice, the circuit court shall not issue any order distributing seized property to that law enforcement agency, prosecuting attorney, or public entity nor shall any grant be awarded by the council to that law enforcement agency, prosecuting attorney, or public entity until:

(i) The appropriate officials of the law enforcement agency, prosecuting attorney, or public entity have appeared before the Legislative Joint Auditing Committee; and

(ii) The Legislative Joint Auditing Committee has adopted a motion authorizing subsequent transfers of forfeited property to the law enforcement agency, prosecuting attorney, or public entity.

(C) Moneys deposited into the Crime Lab Equipment Fund pursuant to subdivision (f)(5)(B) of this section are not subject to recovery or retrieval by the ineligible law enforcement agency, prosecuting attorney, or other public entity.

(6) The Arkansas Drug Director shall establish through rules and regulations a standardized confiscation report form to be used by all law enforcement agencies with specific instructions and guidelines concerning the nature and dollar value of all property, including firearms, to be included in the confiscation report and forwarded to the office of the local prosecuting attorney and the Arkansas Drug Director under this subsection.

(g) INITIATION OF FORFEITURE PROCEEDINGS — NOTICE TO CLAIMANTS — JUDICIAL PROCEEDINGS.

(1)(A) The prosecuting attorney shall initiate forfeiture proceedings by filing a complaint with the circuit clerk of the county where the property was seized and by serving the complaint on all known owners and interest holders of the seized property in accordance with the Arkansas Rules of Civil Procedure.

(B) The complaint may be based on in rem or in personam jurisdiction but shall not be filed in such a way as to avoid the distribution requirements set forth in subdivision (i)(1) of this section.

(C) The prosecuting attorney shall mail a copy of the complaint to the Arkansas Drug Director within five (5) calendar days after filing the complaint.

(2)(A) The complaint shall include a copy of the confiscation report and shall be filed within sixty (60) days after receiving a copy of the confiscation report from the seizing law enforcement agency.

(B) In a case involving real property, the complaint shall be filed within sixty (60) days of the defendant's conviction on the charge giving rise to the forfeiture.

(3)(A) The prosecuting attorney may file the complaint after the expiration of the time set forth in subdivision (g)(2) of this section only if the complaint is accompanied by a statement of good cause for the late filing.

(B) However, in no event shall the complaint be filed more than one hundred twenty (120) days after either the date of the seizure or, in a case involving real property, the date of the defendant's conviction.

(C) If the circuit court determines that good cause has not been established, the circuit court shall order that the seized property be returned to the owner or interest holder.

(4) Within the time set forth in the Arkansas Rules of Civil Procedure, the owner or interest holder of the seized property shall file with the circuit clerk a verified answer to the complaint that shall include:

(A) A statement describing the seized property and the petitioner's interest in the seized property, with supporting documents to establish the petitioner's interest;

(B) A certification by the owner or interest holder stating that he or she has read the document and that it is not filed for any improper purpose;

(C) A statement setting forth any defense to forfeiture; and

(D) The address at which the owner or interest holder will accept mail.

(5)(A) If the owner or interest holder fails to file an answer as required by subdivision (g)(4) of this section, the prosecuting attorney may move for default judgment pursuant to the Arkansas Rules of Civil Procedure.

(B)(i) If a timely answer has been filed, the prosecuting attorney has the burden of proving by a preponderance of the evidence that the seized property should be forfeited.

(ii) After the prosecuting attorney has presented proof under subdivision (g)(5)(B)(i) of this section, any owner or interest holder of the property seized is allowed to present evidence why the seized property should not be forfeited.

(iii)(a) If the circuit court determines that grounds for forfeiting the seized property exist and that no defense to forfeiture has been established by the owner or interest holder, the circuit court shall enter an order pursuant to subsection (h) of this section.

(b) However, if the circuit court determines either that the prosecuting attorney has failed to establish that grounds for forfeiting the seized property exist or that the owner or interest holder has

established a defense to forfeiture, the court shall order that the seized property be immediately returned to the owner or interest holder.

(h) FINAL DISPOSITION.

(1) When the circuit court having jurisdiction over the seized property finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this chapter, the circuit court shall enter an order:

(A) To permit the law enforcement agency or prosecuting attorney to retain the seized property for law enforcement or prosecutorial purposes, subject to the following provisions:

(i)(a) Seized property may not be retained for official use for more than two (2) years, unless the circuit court finds that the seized property has been used for law enforcement or prosecutorial purposes and authorizes continued use for those purposes on an annual basis.

(b) At the end of the retention period, the seized property shall be sold as provided in subdivision (h)(1)(B) of this section and:

(1) Eighty percent (80%) of the proceeds shall be deposited into the drug control fund of the retaining law enforcement agency or prosecuting attorney; and

(2) Twenty percent (20%) of the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund.

(c)(1) Nothing prohibits the retaining law enforcement agency or prosecuting attorney from selling the retained seized property at any time during the time allowed for retention.

(2) However, the proceeds of the sale shall be distributed as set forth in subdivision (h)(1)(A)(i)(b);

(ii) If the circuit court determines that retained seized property has been used for personal use or by non-law enforcement personnel for non-law enforcement purposes, the circuit court shall order the seized property to be sold pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund;

(iii)(a) A drug task force may use forfeited property or money if the circuit court's order specifies that the forfeited property or money is forfeited to the prosecuting attorney, sheriff, chief of police, Department of Arkansas State Police, or Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department.

(b) After the order, the prosecuting attorney, sheriff, chief of police, Department of Arkansas State Police, or Arkansas Highway Police Division shall:

(1) Maintain an inventory of the forfeited property or money;

(2) Be accountable for the forfeited property or money; and

(3) Be subject to the provisions of subdivision (f)(5) of this section with respect to the forfeited property or money;

(iv)(a) Any aircraft is forfeited to the office of the Arkansas Drug Director and may only be used for drug eradication or drug interdiction efforts, within the discretion of the Arkansas Drug Director.

(b) However, if the Arkansas Alcohol and Drug Abuse Coordinating Council determines that the aircraft should be sold, the sale shall be conducted pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds of the sale shall be deposited into the Special State Assets Forfeiture Fund;

(v) Any firearm not retained for official use shall be disposed of in accordance with state and federal law; and

(vi) Any controlled substance, plant, drug paraphernalia, or counterfeit substance shall be destroyed pursuant to a court order;

(B)(i) To sell seized property that is not required by law to be destroyed and that is not harmful to the public.

(ii) Seized property described in subdivision (h)(1)(B)(i) of this section shall be sold at a public sale by the retaining law enforcement agency or prosecuting attorney pursuant to the provisions of § 5-5-101(e) and (f); or

(C) To transfer a motor vehicle to a school district for use in a driver education course.

(2) Disposition of forfeited property pursuant to this subsection is subject to the need to retain the forfeited property as evidence in any related proceeding.

(3) Within three (3) business days of the entry of the order, the circuit clerk shall forward to the Arkansas Drug Director copies of the confiscation report, the circuit court's order, and any other documentation detailing the disposition of the seized property.

(i) DISPOSITION OF MONEYS RECEIVED. Subject to the provisions of subdivision (f)(5) of this section, the proceeds of sales conducted pursuant to subdivision (h)(1)(B) of this section and any moneys forfeited or obtained by judgment or settlement pursuant to this chapter shall be deposited and distributed in the manner set forth in this subsection. Moneys received from a federal forfeiture shall be deposited and distributed pursuant to subdivision (i)(4) of this section.

(1) ASSET FORFEITURE FUND.

(A) The proceeds of any sale and any moneys forfeited or obtained by judgment or settlement under this chapter shall be deposited into the asset forfeiture fund of the prosecuting attorney and is subject to the following provisions:

(i) If, during a calendar year, the aggregate amount of moneys deposited in the asset forfeiture fund exceeds twenty thousand dollars (\$20,000) per county, the prosecuting attorney shall, within fourteen (14) days of that time, notify the circuit judges in the judicial district and the Arkansas Drug Director;

(ii) Subsequent to the notification set forth in subdivision (i)(1)(A)(i) of this section, twenty percent (20%) of the proceeds of any additional sale and any additional moneys forfeited or obtained by judgment or settlement under this chapter in the same calendar year shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund, and the remainder shall be deposited into the asset forfeiture fund of the prosecuting attorney;

(iii) Failure by the prosecuting attorney to comply with the notification requirement set forth in subdivision (i)(1)(A)(i) of this section renders the prosecuting attorney and any entity eligible to receive forfeited moneys or property from the prosecuting attorney ineligible to receive forfeited moneys or property, except as provided in subdivision (f)(5)(A) of this section; and

(iv) Twenty percent (20%) of any moneys in excess of twenty thousand dollars (\$20,000) that have been retained but not reported as required by subdivision (i)(1)(A)(i) of this section are subject to recovery for deposit into the Crime Lab Equipment Fund.

(B) The prosecuting attorney shall administer expenditures from the asset forfeiture fund which is subject to audit by the Division of Legislative Audit. Moneys distributed from the asset forfeiture fund shall only be used for law enforcement and prosecutorial purposes. Moneys in the asset forfeiture fund shall be distributed in the following order:

(i) For satisfaction of any bona fide security interest or lien;

(ii) For payment of any proper expense of the proceeding for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs;

(iii) Any balance under two hundred fifty thousand dollars (\$250,000) shall be distributed proportionally so as to reflect generally the contribution of the appropriate local or state law enforcement or prosecutorial agency's participation in any activity that led to the seizure or forfeiture of the property or deposit of moneys under this chapter; and

(iv) Any balance over two hundred fifty thousand dollars (\$250,000) shall be forwarded to the Arkansas Drug Director to be transferred to the State Treasury for deposit into the Special State Assets Forfeiture Fund for distribution as provided in subdivision (i)(3) of this section.

(C)(i) For a forfeiture in an amount greater than two hundred and fifty thousand dollars (\$250,000) from which expenses are paid for a proceeding for forfeiture and sale under subdivision (i)(1)(B)(ii) of this section an itemized accounting of the expenses shall be delivered to the Arkansas Drug Director within ten (10) calendar days after the distribution of the funds.

(ii) The itemized accounting shall include the expenses paid, to whom paid, and for what purposes the expenses were paid.

(2) DRUG CONTROL FUND.

(A)(i) There is created on the books of law enforcement agencies and prosecuting attorneys a drug control fund.

(ii) The drug control fund shall consist of any moneys obtained under subdivision (i)(1) of this section and any other revenue as may be provided by law or ordinance.

(iii) Moneys from the drug control fund may not supplant other local, state, or federal funds.

(iv) Moneys in the drug control fund are appropriated on a continuing basis and are not subject to the Revenue Stabilization Law, § 19-5-101 et seq.

(v) Moneys in the drug control fund shall only be used for law enforcement and prosecutorial purposes.

(vi) The drug control fund is subject to audit by the Division of Legislative Audit.

(B) The law enforcement agencies and prosecuting attorneys shall submit to the Arkansas Drug Director on or before January 1 and July 1 of each year a report detailing any moneys received and expenditure made from the drug control fund during the preceding six-month period.

(3) SPECIAL STATE ASSETS FORFEITURE FUND.

(A) There is created and established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a fund to be known as the "Special State Assets Forfeiture Fund".

(B)(i) The Special State Assets Forfeiture Fund shall consist of revenues obtained under subdivision (i)(1)(B)(iv) of this section and any other revenue as may be provided by law.

(ii) Moneys from the Special State Assets Forfeiture Fund may not supplant other local, state, or federal funds.

(C) The Special State Assets Forfeiture Fund is not subject to the provisions of the Revenue Stabilization Law, § 19-5-101 et seq., or the Special Revenue Fund Account of the State Apportionment Fund, § 19-5-203(b)(2)(A).

(D)(i) The Arkansas Drug Director shall establish through rules and regulations a procedure for proper investment, use, and disposition of moneys deposited in the Special State Assets Forfeiture Fund in accordance with the intent and purposes of this chapter.

(ii) Moneys in the Special State Assets Forfeiture Fund shall be distributed by the Arkansas Alcohol and Drug Abuse Coordinating Council and shall be distributed for drug interdiction, eradication, education, rehabilitation, the State Crime Laboratory, and drug courts.

(4) FEDERAL FORFEITURES.

(A)(i)(a) Any moneys received by a prosecuting attorney or law enforcement agency from a federal forfeiture shall be deposited and maintained in a separate account.

(b) However, any balance over two hundred fifty thousand dollars (\$250,000) shall be distributed as set forth in subdivision (i)(4)(B) of this section.

(ii) No other moneys may be maintained in the account except for any interest income generated by the account.

(iii) Moneys in the account shall only be used for law enforcement and prosecutorial purposes consistent with governing federal law.

(iv) The account is subject to audit by the Division of Legislative Audit.

(B) Any balance over two hundred fifty thousand dollars (\$250,000) shall be forwarded to the Arkansas Drug Director to be

transferred to the State Treasury for deposit into the Special State Assets Forfeiture Fund in which it shall be maintained separately and distributed consistent with governing federal law.

(j) IN PERSONAM PROCEEDINGS. In personam jurisdiction may be based on a person's presence in the state, or on his or her conduct in the state, as set out in § 16-4-101(c), and is subject to the following additional provisions:

(1) A temporary restraining order under this section may be entered ex parte on application of the state, upon a showing that:

(A) There is probable cause to believe that the property with respect to which the order is sought is subject to forfeiture under this section; and

(B) Notice of the action would jeopardize the availability of the property for forfeiture.

(2)(A) Notice of the entry of a temporary restraining order and an opportunity for hearing shall be afforded to a person known to have an interest in the property.

(B) The hearing shall be held at the earliest possible date consistent with Rule 65 of the Arkansas Rules of Civil Procedure and is limited to the issues of whether:

(i) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the temporary restraining order will result in the property being destroyed, conveyed, alienated, encumbered, disposed of, received, removed from the jurisdiction of the circuit court, concealed, or otherwise made unavailable for forfeiture; and

(ii) The need to preserve the availability of property through the entry of the requested temporary restraining order outweighs the hardship on any owner or interest holder against whom the temporary restraining order is to be entered.

(3) The state has the burden of proof by a preponderance of the evidence to show that the defendant's property is subject to forfeiture.

(4)(A) On a determination of liability of a person for conduct giving rise to forfeiture under this section, the circuit court shall enter a judgment of forfeiture of the property subject to forfeiture as alleged in the complaint and may authorize the prosecuting attorney or any law enforcement officer to seize any property subject to forfeiture pursuant to subsection (a) of this section not previously seized or not then under seizure.

(B) The order of forfeiture shall be consistent with subsection (h) of this section.

(C) In connection with the judgment, on application of the state, the circuit court may enter any appropriate order to protect the interest of the state in property ordered forfeited.

(5) Subsequent to the finding of liability and order of forfeiture, the following procedures apply:

(A) The attorney for the state shall give notice of pending forfeiture, in the manner provided in Rule 4 of the Arkansas Rules of Civil

Procedure, to any owner or interest holder who has not previously been given notice;

(B) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim within thirty (30) days after initial notice of pending forfeiture or after notice under Rule 4 of the Arkansas Rules of Civil Procedure, whichever is earlier; and

(C) The circuit court may amend the in personam order of forfeiture if the circuit court determines that a claimant has established that he or she has an interest in the property and that the interest is exempt under subdivision (a)(4), (6), or (8) of this section.

(k) The circuit court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the circuit court to be subject to forfeiture under subsection (a) of this section if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) Cannot be located;

(2) Was transferred or conveyed to, sold to, or deposited with a third party;

(3) Is beyond the jurisdiction of the circuit court;

(4) Was substantially diminished in value while not in the actual physical custody of the seizing law enforcement agency;

(5) Was commingled with other property that cannot be divided without difficulty; or

(6) Is subject to any interest exempted from forfeiture under this subchapter.

(A) On the fifth day of each month the Treasurer of State shall transfer to the Department of Community Correction Fund Account twenty percent (20%) of any moneys deposited into the Special State Asset Forfeiture Fund during the previous month.

(B) However, in no event shall more than eight hundred thousand dollars (\$800,000) be transferred during any one (1) fiscal year.

(2) Any moneys transferred to the Department of Community Correction Fund Account from the Special State Asset Forfeiture Fund in accordance with this subsection shall:

(A) Be used for the personal services and operating expenses of the drug courts and for no other purpose; and

(B) Not be transferred from the Department of Community Correction Fund Account.

History. Acts 1971, No. 590, Art. 5, § 5; 1977, No. 334, § 1; 1981, No. 78, § 3; 1981, No. 863, §§ 1, 2; 1983, No. 787, §§ 7, 8; 1985, No. 1074, § 1; A.S.A. 1947, § 82-2629; Acts 1989, No. 252, §§ 1, 2; 1989 (3rd Ex. Sess.), No. 87, §§ 1, 2, 4; 1991, No. 573, § 1; 1991, No. 1050, § 1; 1999, No. 1120, § 2; 2001, No. 1495, § 2; 2001, No. 1690, §§ 1, 2; 2003, No. 1447, § 1; 2005, No. 1994, § 310; 2005, No. 2245, § 1.

A.C.R.C. Notes. Acts 1991, No. 573, § 2, provided: "It is the express intent of this Act to create in personam jurisdiction for personal property in forfeiture proceedings. This type of jurisdiction has been authorized through legislation in several states. See, e.g., Arizona Revised

Statutes Annotated Sections 13-4301 to -4315; and Louisiana Revised Statutes Sections 40:2601 to 40:2622. See also the Model Asset Seizure and Forfeiture Act prepared by the American Prosecutors Research Institute's National Drug Prosecution Center."

Acts 1999, No. 1120, § 1, provided: "Legislative intent. As stated in the comment to section 505 of the Uniform Controlled Substances Act, 'Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility.' The General Assembly recognizes the importance of asset forfeiture as a means to confront drug trafficking. However, the General Assembly also recognizes that under the system that existed prior to the enactment of this act, the lack of uniformity and accountability in forfeiture procedures across the state has undermined confidence in the system. As the United States Supreme Court has stated, 'Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly.' In order to alleviate the problems resulting from the lack of uniformity and accountability, the General Assembly has determined that time limits for initiating forfeiture proceedings and stricter controls over forfeited property will help alleviate such problems while strengthening forfeiture as a vital weapon against drug trafficking. Specifically, it is the intent of § 5-64-505(a) that there be no forfeitures based solely upon a misdemeanor possession of a controlled substance. However, if the prosecuting attor-

ney can prove that other evidence exists to establish a basis for forfeiture, the property may be forfeited. It is the intent of § 5-64-505(d) to reduce the conflict between state and federal authorities over seizures executed by state law enforcement officers. It is the intent of § 5-64-505(h) to allow law enforcement agencies and drug task forces to maintain forfeited property for official use, provided that the final order disposing of such property defines the legal entity that is responsible for such property. Section 5-64-505(i)(1)(D) governs those situations in which a seizure results in the forfeiture of money and or property in excess of two hundred fifty thousand dollars (\$250,000). It is the specific intent of the General Assembly that forfeiture proceedings not be structured in such a way as to defeat the General Assembly's intent that money or property in excess of two hundred fifty thousand dollars (\$250,000) be transferred to the Special State Assets Forfeiture Fund. It is determined that such fund can best be used to combat drug trafficking statewide."

Amendments. The 2001 amendment by No. 1495 added (l).

The 2001 amendment by No. 1690 redesignated former (g)(1) as present (g)(1)(A)-(B) and made related changes; added (g)(1)(C) and (i)(1)(C); substituted "be distributed for ... drug courts" for "only be distributed for law enforcement and prosecutorial purposes related to drug interdiction and eradication efforts" in (i)(3)(D); and made minor stylistic changes throughout.

The 2003 amendment added (f)(6).

The 2005 amendment by No. 1994 deleted "subchapters 1-6 of" preceding "this chapter" in (i)(3)(D); and inserted "and" at the end of (i)(1)(A)(iii).

The 2005 amendment by No. 2245 added (h)(1)(C).

RESEARCH REFERENCES

ALR. Burden of proof and presumptions in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law. 104 ALR 5th 229.

Evidence considered in tracing currency, bank account, or cash equivalent to

illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law — Proximity of asset to drugs, paraphernalia, or records. 115 ALR 5th 403.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit

forfeiture, or declaration as contraband, under state law — Odor of drugs. 116 ALR 5th 325.

Evidence considered in tracing currency, bank account, or cash equivalent to illegal drug trafficking so as to permit forfeiture, or declaration as contraband, under state law—Explanation or lack thereof.

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

Arkansas Law Survey, Antley, Criminal Law, 9 UALR L.J. 119.

Survey, Criminal Law, 12 UALR L.J. 617.

Survey — Criminal Law, 14 UALR L.J. 753.

CASE NOTES

ANALYSIS

Constitutionality.

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Acts 1981, No. 78, which criminalized the possession, use, sale and manufacture of drug paraphernalia, and in pertinent part added subsection (i) of this section, is not unconstitutionally overbroad even though the act may prevent persons from utilizing the expressions imprinted on, or the symbolic speech represented by the use of, drug paraphernalia. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

It was not a violation of the Double Jeopardy Clause to require defendant to forfeit his money after he had been sentenced for the same criminal offense which occasioned the forfeiture. *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

Construction.

Because this section is penal in nature and because forfeitures are not favorites of the law, it is interpreted narrowly. *Beebe v. State*, 298 Ark. 119, 765 S.W.2d 943 (1989).

An in rem civil forfeiture action under this section, against the cash defendant had on his person when he was arrested for a drug offense to which he pled guilty,

was a remedial civil sanction, not a criminal penalty, for purposes of the Double Jeopardy Clause. *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

This section effected a repeal by implication of § 24-11-415 in drug trafficking cases; when the seized personal property results from drug trafficking, subsection (k) of this section controls and the proceeds under \$250,000 resulting from the forfeiture sales must be distributed into the Drug Control Funds. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

The federal forfeiture statute, 21 U.S.C.S. § 881, is substantially similar to Ark. Code Ann. § 5-64-505, and cases decided under the federal statute are instructive with regard to the types of proof accepted by courts in civil forfeiture actions. In *re Three Pieces of Prop. Located in Monticello*, 81 Ark. App. 235, 100 S.W.3d 76 (2003).

Purpose.

The clear intent behind this section is to provide additional tools to confront drug trafficking. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

Any Other Property.

The words “any other property” used in subsection (o) mean additional property of any kind owned by the defendant. *State v. Gray*, 322 Ark. 301, 908 S.W.2d 642 (1995).

Under subsection (o), the state may proceed to seek forfeiture of “any other assets,” even though they are not connected to the underlying crime, when forfeitable assets used in the underlying crime are unreachable under the provisions of subdivision (a)(4)(iv). *State v. Gray*, 322 Ark. 301, 908 S.W.2d 642 (1995).

Burden of Proof.

After the State met its burden to prove that the operator of a motor vehicle pos-

sessed and sold illegal drugs while using the vehicle, the owner of the vehicle, in order to obtain its return, was required to show both that the forfeitable acts occurred without her knowledge or consent and, as it was determined that the operator had the owner's permission to use the vehicle, that the forfeitable acts occurred without the knowledge or consent of the operator. *State v. One 1993 Toyota Camry*, 333 Ark. 503, 969 S.W.2d 663 (1998).

Close Proximity.

"In close proximity" as used in subdivision (a)(6) concerning rebuttable presumptions means "very near" and will be determined on a case-by-case basis and not by reference to any rigid rule. *Limon v. State*, 285 Ark. 166, 685 S.W.2d 515 (1985).

Preponderance of the evidence in a forfeiture proceeding placed money in close proximity to controlled substances or drug paraphernalia. *Limon v. State*, 285 Ark. 166, 685 S.W.2d 515 (1985); *Kaiser v. State*, 24 Ark. App. 19, 746 S.W.2d 559, rev'd on other grounds, 296 Ark. 125, 752 S.W.2d 271 (1988).

Iodine is not drug paraphernalia because it is merely a drug ingredient and § 5-64-101(v), as a general statute, is required to yield to the more specific statutes regarding drug ingredients in §§ 5-64-1101 and 1102; therefore, an owner's motion for a directed verdict should have been granted because money found during a body search was not found in close proximity to drug paraphernalia. \$ 735 in *U.S. Currency v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 265 (Mar. 23, 2005).

Conveyances.

Where there was no proof that the mobile home had ever been used as a conveyance of a controlled substance, the mobile home was not a vehicle within the meaning of subdivision (a)(4) of this section. *Gallia v. State*, 287 Ark. 176, 697 S.W.2d 108 (1985).

Where there was no evidence that defendant's truck was being used to transport the controlled substance for the purpose of sale or receipt, forfeiture was inappropriate. *Burnett v. State*, 51 Ark. App. 144, 912 S.W.2d 441 (1995).

Criminal Proceeding.

Where the State brought the forfeiture action against defendant's vehicle under

the in rem portion of this section, the forfeiture action was civil in nature, did not constitute "punishment" for purposes of double jeopardy, and did not bar defendant's subsequent prosecution on charges of possession of a controlled substance. *State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997).

Evidence.

Testimony by an undercover agent that the controlled substance he bought from the defendant was transported in the defendant's automobile, and the judgment of the defendant's conviction, held sufficient to support a finding that the automobile should be forfeited. *Reding v. State*, 277 Ark. 288, 641 S.W.2d 24 (1982).

Where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband unless there are additional factors linking the defendant with the contraband. *Kandur v. State*, 20 Ark. App. 194, 726 S.W.2d 682 (1987).

Where money was found while the police were searching defendant's home under authority of an invalid search warrant, the money could not be confiscated, at least where the only evidence was obtained pursuant to the invalid warrant. *Kandur v. State*, 291 Ark. 194, 726 S.W.2d 682 (1987).

If police officers have not developed a reasonable suspicion of defendant based on the reliability of an informant, seizures resulting from the stop of a car cannot stand and neither can the forfeitures. *Kaiser v. State*, 296 Ark. 125, 752 S.W.2d 271 (1988).

Where the marijuana sale took place in defendant's truck, evidence was sufficient to show that the truck was used to contain or transport marijuana. *Lewis v. State*, 309 Ark. 392, 831 S.W.2d 145 (1992).

Officer's testimony that two pounds of marijuana were found in a truck supported trial court's finding that truck was being used to transport marijuana and was, therefore, subject to forfeiture. *Davison v. State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992).

Testimony supported trial court's finding that gun was being used in the delivery of marijuana, and was subject to forfeiture. *Davison v. State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992).

Testimony supported trial court's find-

ing that gun was being used in the delivery of marijuana, and was subject to forfeiture. *Davison v. State*, 38 Ark. App. 137, 831 S.W.2d 160 (1992).

The trial court erred when it refused to order forfeiture of a car where (1) the person in possession of the car, who was the son of the owners of the car, purchased a pound of marijuana from an informant in a reverse sting operation, and (2) the son of the owners had their permission to use the car. In *re One 1994 Chevrolet Camaro*, 343 Ark. 751, 37 S.W.3d 613 (2001).

In a forfeiture proceeding involving a truck parked outside a residence containing methamphetamine laboratories, a piece of drug paraphernalia found in the truck describing the drug dealer's accounting method was insufficient to show that the truck has been used to transport drugs. 1993 Ford Pick-Up *v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 764 (Oct. 27, 2004).

Forfeiture Proceeding.

A forfeiture is an in rem civil proceeding, independent of the criminal charge and to be decided by a preponderance of the evidence. *Reddin v. State*, 15 Ark. App. 399, 695 S.W.2d 394 (1985).

Section 5-64-401, establishing a presumption of intent to deliver, has no application to a civil forfeiture proceeding. *Burnett v. State*, 51 Ark. App. 144, 912 S.W.2d 441 (1995).

Where no motion was filed by an opposing party pursuant to Ark. R. Civ. P. 55 to set aside two default judgments, the trial court lacked the authority to set aside the default judgment and entered an order forfeiting the property to the county general fund. *State v. \$258,035.00 United States Currency*, 352 Ark. 117, 98 S.W.3d 818 (2003).

Property Rights.

Private property enjoys no constitutional privilege under Ark. Const., Art. 2, § 22 when it is knowingly used to traffic in drugs. *One 1982 Datsun 280ZX v. Bentley ex rel. North Little Rock Police Dep't*, 285 Ark. 121, 685 S.W.2d 498 (1985).

The \$2000 defendant paid an agent for drugs, which had been retained as evidence, was subject to seizure and forfeiture under § 5-64-505, but because no forfeiture action was initiated, the defen-

dant was entitled to return of the money. *Drug Task Force v. Hoffman*, 353 Ark. 182, 114 S.W.3d 213 (2003).

Seizing Agency.

Though not specifically defined in the statute, it is apparent from the context that police, rather than prosecutors, are contemplated by the term "seizing law enforcement agency." *Arkansas Hwy. Police v. Crittenden County Prosecuting Attorney's Office*, 337 Ark. 74, 987 S.W.2d 663 (1999), cert. denied, 528 U.S. 877, 120 S. Ct. 185, 145 L. Ed. 2d 155 (1999).

Where the Arkansas Highway Police seized money from a truck and the Drug Enforcement Agency subsequently adopted the seizure pursuant to federal forfeiture law, a state, rather than federal, seizure occurred and the money remained under the jurisdiction of the circuit court. *Arkansas Hwy. Police v. Crittenden County Prosecuting Attorney's Office*, 337 Ark. 74, 987 S.W.2d 663 (1999), cert. denied, 528 U.S. 877, 120 S. Ct. 185, 145 L. Ed. 2d 155 (1999).

Seizure upheld.

Trial court order directing the forfeiture of three homes to the State under the provisions of Ark. Code Ann § 5-64-505 was affirmed where the evidence showed that a husband and wife held the properties either in joint name or the wife's name alone, that both the husband and wife were convicted of offenses in violation of the Arkansas Uniform Controlled Substances Act, that over \$300,000, drugs, drugs paraphernalia and records consistent with drug trafficking activities were found in one of the homes, and that the homes were purchased after the owners began their drug trafficking activities; however, an equitable lien granted by the trial court to the wife's mother on one of the homes based on the mother's having paid off the mortgage on one of the properties was voided because the mother acted after the property was subject to a temporary restraining order and lis pendens and the mother could not be a good faith purchaser without notice. In *re Three Pieces of Prop. Located in Monticello*, 81 Ark. App. 235, 100 S.W.3d 76 (2003).

Time of Seizure.

Where truck was seized three months before forfeiture proceedings were insti-

tuted under this section, the statutory requirement of promptness was satisfied. *Lewis v. State*, 309 Ark. 392, 831 S.W.2d 145 (1992).

Cited: *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978); *Little Rock Police Dep't ex rel. Munson v. One 1977 Lincoln*

Continental Mark V, 265 Ark. 512, 580 S.W.2d 451 (1979); *Murray v. State*, 275 Ark. 46, 628 S.W.2d 549 (1982); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992); *Harris v. State*, 41 Ark. App. 207, 850 S.W.2d 41 (1993); *Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998).

5-64-506. Burden of proof — Liability of officers.

(a)(1) It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter.

(2) The burden of proof of any exemption or exception is upon the person claiming it.

(b)(1) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this chapter, he or she is presumed not to be the holder of the registration or order form.

(2) The burden of proof is upon him or her to rebut the presumption.

(c) No liability is imposed by this chapter upon any authorized state, county, or municipal officer engaged in the lawful performance of his or her duties.

History. Acts 1971, No. 590, Art. 5, § 6; A.S.A. 1947, § 82-2630; Acts 2005, No. 1994, § 311.

Amendments. The 2005 amendment

deleted "subchapters 1-6 of" preceding "this chapter" throughout this section; and inserted "or she" and "or her" in (b).

RESEARCH REFERENCES

ALR. Burden of proof and presumptions in tracing currency, bank account, or cash equivalent to illegal drug trafficking

so as to permit forfeiture, or declaration as contraband, under state law. 104 ALR 5th 229.

CASE NOTES

Exemption from Act.

Defendant had burden of showing he was exempt from act and authorized to deliver controlled substance and state need not negate the exemption. *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974).

In adopting this section which specifically exempts state officers from liability under the Uniform Controlled Substances Act when engaged in the performance of

their duties, the legislature clearly recognized the possible need of law enforcement officials to utilize real drugs during the course of undercover sting operations. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

Cited: *Rogers v. State*, 258 Ark. 314, 524 S.W.2d 227, cert. denied, 423 U.S. 995, 96 S. Ct. 423, 46 L. Ed. 2d 369 (1975); *Garner v. State*, 258 Ark. 321, 524 S.W.2d 223 (1975).

5-64-507. Conclusiveness of findings.

(a) Any final determination, finding, or conclusion of the Director of the Division of Health of the Department of Health and Human

Services under this chapter is a final and conclusive decision of the matter involved.

(b) Any person aggrieved by the decision may obtain review of the decision in the circuit court of the county.

(c) If supported by substantial evidence, a finding of fact by the director is conclusive.

History. Acts 1971, No. 590, Art. 5, § 7; A.S.A. 1947, § 82-2631; Acts 2005, No. 1994, § 311.

Amendments. The 2005 amendment deleted "subchapters 1-6 of" preceding "this chapter."

5-64-508. Prevention and deterrence — Educational and research programs.

(a) The Director of the Bureau of Alcohol and Drug Abuse Prevention shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs he or she may:

(1) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) Consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) Evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and

(6) Assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The Director of the Bureau of Alcohol and Drug Abuse Prevention shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this chapter, he or she may:

(1) Establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) Make studies and undertake programs of research to:

(A) Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this chapter;

(B) Determine patterns of misuse and abuse of controlled substances and the social effects of misuse and abuse of controlled substances; and

(C) Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) Enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects that bear directly on misuse and abuse of controlled substances.

(c) The Director of the Bureau of Alcohol and Drug Abuse Prevention may enter into contracts for educational and research activities without performance bonds.

(d)(1) The Director of the Division of Health of the Department of Health and Human Services may authorize a person engaged in research on the use and effects of a controlled substance to withhold the names and other identifying characteristics of individuals who are the subjects of the research.

(2) A person who obtains this authorization is not compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e)(1) The Director of the Division of Health of the Department of Health and Human Services may authorize the possession and distribution of a controlled substance by a person engaged in research.

(2) A person who obtains this authorization is exempt from state prosecution for possession and distribution of a controlled substance to the extent of the authorization.

History. Acts 1971, No. 590, Art. 5, § 8; 1979, No. 898, § 15; A.S.A. 1947, § 82-2632; Acts 2005, No. 1994, § 311.

Amendments. The 2005 amendment inserted "or she" in (a) and (b); deleted

"subchapters 1-6 of" preceding "this chapter" in (b) and present (b)(2)(A); and redesignated former (b)(2)(i)-(iii) as present (b)(2)(A)-(C).

CASE NOTES

Cited: *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996).

5-64-509. [Repealed.]

Publisher's Notes. This section, concerning uncontested forfeitures, was repealed by Acts 1999, No. 1120, § 4. The

section was derived from Acts 1991, No. 859, § 1.

SUBCHAPTER 6 — UNIFORM CONTROLLED SUBSTANCES ACT — MISCELLANEOUS

SECTION.

5-64-601 — 5-64-608. [Repealed.]

5-64-601 — 5-64-608. [Repealed.]

Publisher's Notes. This subchapter was repealed by Acts 2005, No. 1994,

§ 548. The subchapter was derived from the following sources:

5-64-601. Acts 1971, No. 590, Art. 6, § 1;
A.S.A. 1947, § 82-2633.

5-64-602. Acts 1971, No. 590, Art. 6, § 2;
A.S.A. 1947, § 82-2634.

5-64-603. Acts 1971, No. 590, Art. 6, § 3;
A.S.A. 1947, § 82-2635.

5-64-604. Acts 1971, No. 590, Art. 6, § 4;
A.S.A. 1947, § 82-2636.

5-64-605. Acts 1971, No. 590, Art. 6, § 7;
A.S.A. 1947, § 82-2638n.

5-64-606. Acts 1971, No. 590, Art. 6, § 8;
A.S.A. 1947, § 82-2638n.

5-64-607. Acts 1971, No. 590, Art. 6, § 9;
A.S.A. 1947, § 82-2638n.

5-64-608. Acts 1971, No. 590, Art. 6, § 5;
1979, No. 898, § 20; 1983, No. 511, § 12;
A.S.A. 1947, § 82-2637.

SUBCHAPTER 7 — PROVISIONS RELATING TO THE UNIFORM CONTROLLED SUBSTANCES ACT

SECTION.

5-64-701. [Repealed.]

5-64-702. Promulgation of rules and regulations.

5-64-703. Authority to make inspections.

5-64-704. Consent to inspection.

5-64-705. Authority to investigate and arrest in contiguous county.

5-64-706. Grant of immunity.

SECTION.

5-64-707. Admissibility of drug analysis — Cross-examination.

5-64-708. Local funding for undercover work.

5-64-709. [Repealed.]

5-64-710. Denial of driving privileges for minor — Restricted permit.

Publisher's Notes. Schedules I through VI referred to in this subchapter are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

Preambles. Acts 1983, No. 229, contained a preamble which read: "Whereas, the General Assembly of the State of Arkansas finds that the unlawful distribution of drugs to school children and other children under the age of eighteen (18) years is causing a threat of personal harm to such children, and in many instances actual harm to those children; and

"Whereas, it is necessary to immediately amend the Controlled Substances Act to stiffen the criminal penalties for such unlawful distribution..."

Effective Dates. Acts 1973, No. 248, § 3: Mar. 7, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the proper and efficient enforcement of the provisions of the Uniform

Controlled Substances Act that the Prosecuting Attorneys and Grand Juries in the State be authorized to grant immunity from prosecution to persons giving testimony in criminal proceedings under that Act, and that this Act is designed to permit the granting of such immunity and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 229, § 4: became law without Governor's signature, Feb. 22, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an epidemic of the unlawful distribution of drugs to school children; that existing criminal penalties are inadequate as a deterrent to such practices and that this Act is immediately necessary to provide more stringent penalties for such unlawful drug trafficking. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 93, § 6: Nov. 17, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that additional enforcement mechanisms are urgently needed to deter persons under 18 years of age from illegally using or dealing in drugs; that this Act provides an additional enforcement mechanism; and that this Act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use and sale of drugs. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1257, § 11: Apr. 20, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that federal

mandates require the loss of federal highway funds without implementation of a system of suspending the driving privileges of persons holding such privileges granted by this State and found guilty of certain drug offenses, whether such finding occurred in this state or out-of-state, and that additional enforcement provisions are urgently needed to deter persons illegally using or dealing in drugs; that this Act will provide that additional enforcement mechanism; and that this Act should go into effect immediately in order to meet the requirements of the federal law and to grant law enforcement officers and courts greater flexibility in dealing with the illegal use and sale of drugs. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

5-64-701. [Repealed.]

Publisher's Notes. This section, concerning penalties for delivery of controlled substances, was repealed by Acts 2005, No. 1994, § 549. The section was derived

from Acts 1975, No. 1005, §§ 1-3; 1983, No. 229, § 1; A.S.A. 1947, §§ 82-2641 — 82-2643.

For present law, see § 5-64-410.

5-64-702. Promulgation of rules and regulations.

(a) The Department of Health and Human Services may promulgate rules and regulations necessary for the enforcement of this chapter.

(b) The rules and regulations described in subsection (a) of this section shall be promulgated pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

History. Acts 1979, No. 898, § 17; A.S.A. 1947, § 82-2632.1; Acts 2005, No. 1994, § 312.

Amendments. The 2005 amendment

deleted "the Uniform Controlled Substances Act, as amended, subchapters 1-6 of" preceding "this chapter" in (a).

5-64-703. Authority to make inspections.

In carrying out the functions under this chapter, the Director of the Division of Health of the Department of Health and Human Services or his or her duly authorized agent may enter a controlled premises and conduct an administrative inspection of the controlled premises.

History. Acts 1979, No. 898, § 18; A.S.A. 1947, § 82-2632.2; Acts 2005, No. 1994, § 312.

Amendments. The 2005 amendment deleted "subchapters 1-6 of" preceding "this chapter."

5-64-704. Consent to inspection.

An administrative inspection warrant is not required if informed consent is obtained from the owner, operator, or agent-in-charge of the controlled premises to be inspected.

History. Acts 1979, No. 898, § 19; A.S.A. 1947, § 82-2632.3.

5-64-705. Authority to investigate and arrest in contiguous county.

Upon receiving permission from the proper county sheriff, any law enforcement officer acting within the official scope of his or her duty may investigate and arrest any person violating any provision of this chapter in any county contiguous to the county where he or she is employed.

History. Acts 1985, No. 675, § 1; A.S.A. 1947, § 82-2625.2; Acts 2005, No. 1994, § 313.

Publisher's Notes. Acts 1985, No. 675, § 1, is also codified as § 12-12-102.

Amendments. The 2005 amendment

deleted "the Uniform Controlled Substances Act, as amended, subchapters 1-6 of" preceding "this chapter."

Cross References. Stopping and detention of person; time limitations, ARCrP 3.1.

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Procedure, 13 UALR L.J. 349.

CASE NOTES

ANALYSIS

Arrest outside jurisdiction.
Territorial jurisdiction.

Arrest Outside Jurisdiction.

There are only four instances where the General Assembly has delegated the authority for law enforcement officers to make an arrest outside of their jurisdictions: (1) "fresh pursuit" (§ 16-81-301); (2) when the police officer has a warrant for arrest (§ 16-81-105); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction (§ 16-81-106(3) and (4)); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of

drug laws (§ 5-64-705). *Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997).

Territorial Jurisdiction.

The traditional concept of territorial jurisdiction for peace officers is a sound one since a local community is best served by the requirement that local officers familiar with local neighborhoods make arrests in the community. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

A local police officer, acting without a warrant outside the territorial limits of the jurisdiction under which he holds office, is without official power to apprehend an offender unless he is authorized to do so by statute, and evidence obtained as a result of an unlawful detention or illegal arrest is subject to the exclusionary rule and should be suppressed. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Cited: *Davis v. Dahmm*, 763 F. Supp. 1010 (W.D. Ark. 1991).

5-64-706. Grant of immunity.

(a)(1) With the approval of the circuit judge, the prosecuting attorney of any judicial district in this state or any grand jury properly convened according to law may grant immunity from criminal prosecution with respect to a matter revealed by the testimony of anyone giving evidence concerning a violation of this chapter.

(2) However, the immunity does not extend to perjury committed in the testimony.

(b) No prosecuting attorney shall grant immunity until he or she has applied for and obtained in each case a written order from the circuit judge approving the grant of immunity.

(c) No immunity under subsection (a) of this section shall be granted by a prosecuting attorney until after the individual has declined to answer questions or has requested immunity before answering questions.

History. Acts 1973, No. 248, § 1; A.S.A. 1947, § 82-2639; Acts 2005, No. 1994, § 313.

Amendments. The 2005 amendment

deleted "the Uniform Controlled Substances Act, subchapters 1-6 of" preceding "this chapter" in (a).

CASE NOTES**Court Approval.**

The defendant in a prosecution for drug offenses was not entitled to immunity with regard to incriminating statements he made during police interviews where there was never any agreement to grant

immunity made by the prosecuting attorney and, even if there had been such an agreement, there was no written court approval for it. *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998).

5-64-707. Admissibility of drug analysis — Cross-examination.

(a) In any criminal prosecution for an alleged violation of this chapter, a record or report of any relevant drug analysis made by the State Crime Laboratory shall be received as competent evidence as to a matter contained in the record or report in this section in any preliminary hearing when attested to by the Executive Director of the State Crime Laboratory or his or her assistant or deputy.

(b)(1) Nothing in this section abrogates a defendant's right of cross-examination.

(2) If the defendant desires to cross-examine the executive director or the appropriate assistant or deputy, the defendant may compel the executive director or his or her appropriate assistant or deputy to attend court by the issuance of a proper subpoena.

(3) If the defendant compels the executive director or his or her appropriate assistant or deputy to attend court by the issuance of a proper subpoena:

(A) The record or report is only admissible through the executive director or the appropriate assistant or deputy; and

(B) The executive director or the appropriate assistant or deputy is subject to cross-examination by the defendant or his or her counsel.

History. Acts 1977, No. 356, § 1; A.S.A. 1947, § 82-2627.1; Acts 2005, No. 1994, § 313.

Amendments. The 2005 amendment

deleted “subchapters 1-6 of” preceding “this chapter” in (a); and inserted “or her” in (a), (b)(2) and (b)(3).

5-64-708. Local funding for undercover work.

Any municipality or county may allocate and expend funds for:

- (1) Undercover work done in connection with an attempt to apprehend a violator of this chapter; or
- (2) A purchase of a controlled substance when purchased by a law enforcement officer for the purpose of apprehending a violator.

History. Acts 1973, No. 248, § 2; A.S.A. 1947, § 82-2640; Acts 2005, No. 1994, § 313.

Amendments. The 2005 amendment

deleted “the Uniform Controlled Substances Act, subchapters 1-6 of” preceding “this chapter.”

5-64-709. [Repealed.]

Publisher’s Notes. This section, concerning additional court costs, was repealed by Acts 1995, No. 1256, § 20, as

amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1989, No. 631, § 1; 1991, No. 316, § 1.

5-64-710. Denial of driving privileges for minor — Restricted permit.

(a)(1) As used in this section “drug offense” means the:

- (A) Possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell, or transfer any substance the possession of which is prohibited under this chapter; or
- (B) Operation of a motor vehicle under the influence of any substance the possession of which is prohibited under this chapter.

(2) As used in subdivision (a)(1) of this section,

- (i) “Motor vehicle” means any vehicle that is self-propelled by which a person or thing may be transported upon a public highway and is registered in the State of Arkansas or of the type subject to registration in Arkansas.
- (ii) “Motor vehicle” includes any:
 - (a) “Motorcycle”, “motor-driven cycle”, or “motorized bicycle”, as defined in § 27-20-101; and
 - (b) “Commercial motor vehicle”, as defined in § 27-23-103; and

(B) “Substance the possession of which is prohibited under this chapter” or “substance” means a “controlled substance” or “counterfeit substance”, as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802.

(b)(1)(A) When a person who is less than eighteen (18) years of age pleads guilty or nolo contendere to or is found guilty of driving while intoxicated under § 5-65-101 et seq., any criminal offense involving the illegal possession or use of a controlled substance, or any drug

offense in this state or any other state, the court having jurisdiction of the matter including any federal court shall prepare and transmit to the Department of Finance and Administration an order of denial of driving privileges for the minor.

(B) A court within the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section to the department within twenty-four (24) hours after the plea or finding.

(C) A court outside Arkansas having jurisdiction over any person holding driving privileges issued by the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section pursuant to an agreement or arrangement entered into between that state and the Director of the Department of Finance and Administration.

(D) An arrangement or agreement under subdivision (b)(1)(C) of this section may also provide for the forwarding by the department of an order issued by a court within this state to the state where any person holds driving privileges issued by that state.

(2) For any person holding driving privileges issued by the State of Arkansas, a court within this state in a case of extreme and unusual hardship may provide in an order for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school.

(c)(1) Except as provided in subdivision (c)(2) of this section, a penalty prescribed in this section and § 27-16-914 is in addition to any other penalty prescribed by law for an offenses covered by this section and § 27-16-914.

(2) A juvenile adjudicated delinquent is subject to a juvenile disposition provided in § 9-27-330.

(d) In regard to any offense involving illegal possession under this section, it is a defense if the controlled substance is the property of an adult who owns the vehicle.

(e) If a juvenile is found delinquent for any offense described in subsections (a) or (b) of this section, the circuit court may order any juvenile disposition available under § 9-27-330.

History. Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4; 1993, No. 1257, § 1; 2005, No. 1876, § 1; 2005, No. 1994, § 314.

A.C.R.C. Notes. Acts 1993, No. 1257, § 7 provided: "The Director of the Department of Finance and Administration is authorized to enter into any agreements or arrangements with other states and to take all action deemed necessary or proper, including the making and promulgation of rules and regulations, in order that the amendments contained in this Act may be effectuated."

Publisher's Notes. Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4, are also codified as § 5-65-116.

Amendments. The 2005 amendment by No. 1876 deleted "or is found by a juvenile court to have committed such an offense" preceding "the court having jurisdiction" in (b)(1)(A); added the subdivision (1) designation in (c) and added (c)(2); substituted "Except as provided in subdivision (c)(2) of this section, penalties" for "Penalties" in present (c)(1); and added (e).

The 2005 amendment by No. 1994 substituted "this chapter" for "the Uniform Controlled Substances Act, § 5-64-101 et seq." in (a)(1).

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12
UALR L.J 617.

CASE NOTES

Constitutionality.

The classification drawn at age eighteen in Acts 1989, No. 93 was reasonable and does not approach the level of irrationality or arbitrariness necessary to deem it unconstitutional. *Carney v. State*, 305 Ark. 431, 808 S.W.2d 755 (1991).

Cited: *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), cert. denied, 507 U.S. 1005, 113 S. Ct. 1647, 123 L. Ed. 2d 268 (1993).

SUBCHAPTER 8 — SALE OF DRUG DEVICES

SECTION.

5-64-801. Definition.

5-64-802. Illegal drug paraphernalia business.

5-64-803. Public nuisance to be abated or

SECTION.

closed.

5-64-804. Injunction.

5-64-805. Search warrant.

5-64-806. Seizure and forfeiture.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

CASE NOTES

Constitutionality.

Acts 1981, No. 946 which enacted this subchapter prohibiting the operation of an illegal drug paraphernalia business, is not unconstitutionally overbroad, nor does it violate the due process rights of business owners on the claimed ground that discriminatory enforcement is a hypothetical possibility. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

Acts 1981, No. 946 which enacted this subchapter, satisfies the fair notice due

process requirements of what conduct is prohibited because in order to violate this section the offender must not only be distributing on a regular basis devices which are usable with illegal drugs, but the offender must also know or have reason to know that the objects are designed to be primarily useful as drug devices. *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984).

5-64-801. Definition.

(a) As used in this subchapter, "drug device" means an object usable for smoking marijuana, for smoking a controlled substance defined as a tetrahydrocannabinol, or for ingesting or inhaling cocaine, and includes, but is not limited to:

(1) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;

- (2) A water pipe;
 - (3) A smoking or carburetion mask;
 - (4) A smoking or carburetion mask;
 - (5) A roach clip, meaning an object used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
 - (6) A chamber pipe;
 - (7) A carburetor pipe;
 - (8) An electric pipe;
 - (9) An air-driven pipe;
 - (10) A chillum;
 - (11) A bong;
 - (12) An ice pipe or chiller; and
 - (13) A miniature cocaine spoon or a cocaine vial.
- (b) In any prosecution under this subchapter, the question of whether an object is a drug device is a question of fact.

History. Acts 1981, No. 946, § 1;
A.S.A. 1947, § 82-2644.

5-64-802. Illegal drug paraphernalia business.

(a) Any person who conducts, finances, manages, supervises, directs, or owns any part of an illegal drug paraphernalia business is guilty of a:

- (1) Class A misdemeanor for the first offense;
- (2) Class D felony for the second offense; and
- (3) Class C felony for third and subsequent offenses.

(b) A person violates subsection (a) of this section if he or she:

(1) Conducts, finances, manages, supervises, directs, or owns any part of a business that, in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away, or furnishes an object designed to be primarily useful as a drug device; and

(2) Knows or has reason to know that the design of the object renders it primarily useful as a drug device.

History. Acts 1981, No. 946, § 1;
A.S.A. 1947, § 82-2644.

5-64-803. Public nuisance to be abated or closed.

(a) A place where a drug device is manufactured, sold, stored, possessed, given away, or furnished in violation of this section is deemed a common or public nuisance.

(b) A conveyance or vehicle of any kind is deemed a place within the meaning of this section and may be proceeded against under the provisions of § 5-64-804.

(c) A person who maintains, or aids or abets, or knowingly associates with another in maintaining a common or public nuisance under

subsection (a) of this section, and judgment shall be given that the common or public nuisance be abated or closed as a place for the manufacture, sale, storage, possession, giving away, or furnishing of a drug device.

History. Acts 1981, No. 946, § 1;
A.S.A. 1947, § 82-2644.

5-64-804. Injunction.

(a) The prosecuting attorney or a citizen of the county or municipality where a common or public nuisance, as defined in § 5-64-803, is located may maintain a suit in the name of the state to abate and perpetually enjoin the common or public nuisance.

(b) A circuit court has jurisdiction over the suit.

(c) An injunction may be granted at the commencement of the suit and no bond is required if the action for injunction is brought by the prosecuting attorney.

(d) If the suit for injunction is brought or maintained by a citizen of the county or municipality where the common or public nuisance is alleged to be located, then the circuit court may require a bond as in any other case of injunction.

(e) On the finding that the material allegations of the complaint are true, the circuit court or judge of the circuit court in vacation shall order the injunction for such period of time as the circuit court or judge may think proper, with the right to dissolve the injunction upon the application of the owner of the place if a proper case is shown for the dissolution.

(f) The continuance of the injunction as provided in this section may be ordered, although the place complained of may not at the time of hearing be unlawfully used.

History. Acts 1981, No. 946, § 1;
A.S.A. 1947, § 82-2644.

5-64-805. Search warrant.

(a) If there is complaint on oath or affirmation supported by affidavit setting forth the facts for a belief that a drug device is being manufactured, sold, kept, stored, or in any manner held, used, or concealed in a particular house or other place with intent to engage in illegal drug paraphernalia business in violation of law, a circuit court or the judge of the circuit court in vacation to whom the complaint is made, if satisfied that there is probable cause for the belief, shall issue a warrant to search the house or other place for the drug device.

(b) Except as otherwise provided in this section, a warrant issued under subsection (a) of this section shall be issued, directed, and executed in accordance with the laws of Arkansas pertaining to search warrants.

(c) A warrant issued under this section for the search of any automobile, boat, conveyance, or vehicle, or for the search of any trunk, grip, or other article of baggage, for a drug device may be executed in any part of the state where the same are overtaken and shall be made returnable before any circuit court or the judge of the circuit court in vacation, within whose jurisdiction the automobile, boat, conveyance, vehicle, trunk, grip, or other article of baggage, or any of them, were transported or attempted to be transported.

(d) If it is necessary, an officer charged with the execution of a warrant issued under this section may break open and enter a house or other place described in this section.

History. Acts 1981, No. 946, § 1;
A.S.A. 1947, § 82-2644.

5-64-806. Seizure and forfeiture.

Any property, including money, used in violation of a provision of this subchapter may be seized and forfeited to the state.

History. Acts 1981, No. 946, § 1;
A.S.A. 1947, § 82-2644.

Cross References. Donation of seized equipment to public schools, § 6-21-102.

SUBCHAPTER 9 — CIVIL ACTIONS AGAINST SELLERS OF DRUG PARAPHERNALIA

SECTION.

5-64-901 — 5-64-906. [Transferred.]

5-64-901 — 5-64-906. [Transferred.]

Publisher's Notes. The provisions of this subchapter have been transferred to chapter 118 of title 16.

SUBCHAPTER 10 — RECORDS OF TRANSACTIONS

SECTION.

5-64-1001. Recordkeeping required.
5-64-1002. Identification of purchaser.
5-64-1003. Inspection of records.
5-64-1004. Failure to maintain records —
Penalty.

SECTION.

5-64-1005. Exemptions.
5-64-1006. Suspicious order reports.

Effective Dates. Acts 2001, No. 1209, §§ 6, 7: June 1, 2001. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the methamphetamine problem has become epidemic in the State of Arkansas; that drastic measures are needed to control the sale and possession

of large quantities of over-the-counter medicines which contain the necessary ingredients for making methamphetamine; that the public's inconvenience is far outweighed by the necessity of curtailing the illegal production and distribution of methamphetamine; that giving this act immediate effect may spare thousands of

Arkansans from the devastation caused from methamphetamine addiction. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto. Approved Mar. 30, 2001."

Acts 2005, No. 256, § 7: Mar. 24, 2005. Emergency clause provided: "It is hereby found and determined by the Eighty-fifth General Assembly that the effectiveness of this act is essential to the safety of the citizens of Arkansas; that excessive and improper exposure to illicit clandestine

laboratories for the manufacture of methamphetamine causes harm to citizens of Arkansas; and that a delay in the effective date of this act beyond thirty days needed to implement it would unnecessarily expose the citizens of Arkansas to the risk of irreparable harm. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be effective on: (1) Thirty (30) days from and after the date of its passage and approval; (2) If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days from the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days from the date the last house overrides the veto."

5-64-1001. Recordkeeping required.

Any manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes any of the following substances to any person in this state shall maintain accurate records of those transactions:

- (1) Phenylpropanolamine;
- (2) Methylamine;
- (3) Ethylamine;
- (4) D-lysergic acid;
- (5) Ergotamine tartrate;
- (6) Diethyl malonate;
- (7) Malonic acid;
- (8) Ethyl malonate;
- (9) Barbituric acid;
- (10) Piperidine;
- (11) N-acetylanthranilic acid;
- (12) Pyrrolidine;
- (13) Anthranilic acid;
- (14) Ephedrine;
- (15) Norpseudoephedrine;
- (16) Phenylacetic acid;
- (17) Morpholine; and
- (18) Pseudoephedrine.

History. Acts 1989, No. 518, § 1.

5-64-1002. Identification of purchaser.

(a) Any manufacturer, wholesaler, retailer, or other person required to maintain records of transactions under this subchapter shall obtain proper identification from the purchaser.

(b) "Proper identification" means a motor vehicle operator's license or other official state-issued identification of the purchaser that contains a photograph of the purchaser, and includes:

(1) The residential or mailing address of the purchaser, other than a post office box number;

(2) The motor vehicle license number of any motor vehicle owned or operated by the purchaser; and

(3) A letter of authorization from the business for which any substance specified in § 5-64-1001 is being furnished, that includes:

(A) The business license number and address of the business;

(B) A full description of how the substance is to be used; and

(C) The signature of the purchaser.

(c) The person selling, transferring, or otherwise furnishing any substance specified in § 5-64-1001 shall affix his or her signature as a witness to the signature and identification of the purchaser.

History. Acts 1989, No. 518, § 1.

5-64-1003. Inspection of records.

A record maintained pursuant to this subchapter is subject to inspection by any law enforcement officer of this state or any employee of the Division of Health of the Department of Health and Human Services designated by the Director of the Division of Health of the Department of Health and Human Services to conduct an examination, investigation, or inspection under this chapter relating to a controlled substance, counterfeit drug, or precursor chemical.

History. Acts 1989, No. 518, § 1.

5-64-1004. Failure to maintain records — Penalty.

Failure to maintain accurate records with proper identification from the purchaser is considered a Class A misdemeanor.

History. Acts 1989, No. 518, § 1.

5-64-1005. Exemptions.

The provisions of § 5-64-1001 do not apply to any of the following:

(1) Any pharmacist or other authorized person who sells or furnishes a substance upon the prescription of a physician, dentist, podiatrist, or veterinarian;

(2) Any physician, dentist, podiatrist, or veterinarian who administers or furnishes a substance to his or her patient;

(3) Any manufacturer or wholesaler licensed by the Arkansas State Board of Pharmacy that sells, transfers, or otherwise furnishes a substance to a licensed pharmacy, physician, dentist, podiatrist, or veterinarian; or

(4) Any sale, transfer, furnishing, or receipt by a retail distributor of any drug that contains any ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine and that is sold, transferred, or furnished over the counter without a prescription pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or regulations adopted under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., if:

(A) The drug is sold in a blister pack of not more than three grams (3 g) of ephedrine, pseudoephedrine, or phenylpropanolamine base, each blister containing not more than two (2) dosage units;

(B) If the use of a blister pack is technically unfeasible, the drug is packaged in a unit dose packet or pouch;

(C) The drug is an exempted product described in § 5-64-1103(b)(1), or the product contains ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form described in § 5-64-1103(b)(2), and is sold in a package size of not more than three grams (3 g) of ephedrine or pseudoephedrine base; and

(D) The total quantity of the sale is not greater than three (3) packages or five grams (5 g) of ephedrine or nine grams (9 g) of pseudoephedrine, whichever is smaller.

History. Acts 1989, No. 518, § 1; 2001, No. 1209, § 1; 2005, No. 256, § 3.

A.C.R.C. Notes. Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of

Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

Amendments. The 2001 amendment, in (d), inserted "by a retail distributor" following "receipt" and added "provided that" in the introductory language; and added (d)(1) through (d)(4).

The 2005 amendment rewrote (d)(3); and substituted "packages, or five (5) grams of ephedrine, or nine (9) grams of pseudoephedrine" for "packages or nine (9) grams" in (d)(4).

U.S. Code. The Federal Food, Drug, and Cosmetic Act, referred to in this section, is codified as 21 U.S.C. § 301 et seq.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-64-1006. Suspicious order reports.

(a) Any pharmacy, manufacturer, wholesaler, or retail distributor that is required to keep records under this subchapter and that sells, transfers, or otherwise furnishes ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, to any person in this state in a suspicious transaction shall report the transaction in writing to the Arkansas State Board of Pharmacy.

(b) Any person who does not submit a report as required by subsection (a) of this section is guilty of a Class A misdemeanor.

(c) As used in this section, "suspicious transaction" means a sale or transfer to which either of the following applies:

(1) The circumstances of the sale or transfer would lead a reasonable person to believe that the substance is likely to be used for the purpose of unlawfully manufacturing a controlled substance in violation of this chapter based on such factors as:

(A) The amount involved;

(B) The method of payment;

(C) The method of delivery; and

(D) Past dealings with the person acquiring the substance; or

(2) The transaction involves payment for ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, in cash or money orders totaling more than two hundred dollars (\$200).

(d)(1) The board shall adopt by rule criteria for determining whether a transaction is suspicious transaction, taking into consideration the recommendations in Appendix A, Report to the United States Attorney General by the Suspicious Orders Task Force, under the Comprehensive Methamphetamine Control Act of 1996, Pub.L. 104-237.

(2) In addition to any other penalty provided for in this section, the board may impose a civil penalty for a violation of subsection (a) of this section not to exceed ten thousand dollars (\$10,000) per violation.

History. Acts 2001, No. 1209, § 2; 2005, No. 256, § 4.

A.C.R.C. Notes. Acts 2005, No. 256, § 1, provided: "The General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of metham-

phetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

Amendments. The 2005 amendment, in (a), inserted "pharmacy" and substituted "that" for "who" twice.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

SUBCHAPTER 11 — EPHEDRINE

SECTION.

- 5-64-1101. Possession — Penalty.
- 5-64-1102. Possession with intent to
manufacture — Unlawful
distribution.

SECTION.

- 5-64-1103. Sales limits.

A.C.R.C. Notes. References to “this chapter” in subchapters 1-10 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 2001, No. 1209, § 6: June 1, 2001.

Acts 2001, No. 1209, § 7: Mar. 30, 2001. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the methamphetamine problem has become epidemic in the State of Arkansas; that drastic measures are needed to control the sale and possession of large quantities of over-the-counter medicines which contain the necessary ingredients for making methamphetamine; that the public’s inconvenience is far outweighed by the necessity of curtailing the illegal production and distribution of methamphetamine; that giving this act immediate effect may spare thousands of Arkansans from the devastation caused from methamphetamine addiction. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If

the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

Acts 2005, No. 256, § 7: Mar. 24, 2005. Emergency clause provided: “It is hereby found and determined by the Eighty-fifth General Assembly that the effectiveness of this act is essential to the safety of the citizens of Arkansas; that excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine causes harm to citizens of Arkansas; and that a delay in the effective date of this act beyond thirty days needed to implement it would unnecessarily expose the citizens of Arkansas to the risk of irreparable harm. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be effective on: (1) Thirty (30) days from and after the date of its passage and approval; (2) If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days from the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days from the date the last house overrides the veto.”

5-64-1101. Possession — Penalty.

(a) It is be unlawful for any person to possess more than five grams (5 g) of ephedrine or nine grams (9 g) of pseudoephedrine or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, except:

(1) Any pharmacist or other authorized person who sells or furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers, upon the prescription of a physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority, or as authorized pursuant to § 5-64-1103;

(2) A product exempted under § 5-64-1103(b)(1) and (2), without a prescription, pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., or regulations adopted under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., if the person possesses a sales and use tax permit issued by the Department of Finance and Administration;

(3) Any physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority who administers or furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers to his or her patient; or

(4)(A) Any manufacturer, wholesaler, or distributor licensed by the Arkansas State Board of Pharmacy that meets one (1) of the requirements in subdivision (a)(4)(B) of this section and sells, transfers, or otherwise furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers to:

(i) A licensed pharmacy, physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority; or

(ii) Any person who possesses a sales and use tax permit issued by the department.

(B)(i) The manufacturer, wholesaler, or distributor shall hold or store the substance in a facility that meets the packaging requirements of § 5-64-1005(d)(1)-(3).

(ii) The manufacturer, wholesaler, or distributor shall sell, transfer, or otherwise furnish only to a healthcare professional identified in subdivisions (a)(1) and (3) of this section.

(b) Possession of more than five grams (5 g) of ephedrine or more than nine grams (9 g) of pseudoephedrine or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers constitutes prima facie evidence of the intent to manufacture methamphetamine or another controlled substance in violation of this subchapter unless the person qualifies for an exemption listed in subsection (a) of this section.

(c) Any person who violates a provision of this section is guilty of a Class D felony.

History. Acts 1997, No. 565, § 1; 2001, No. 1209, § 3; No. 1782, § 1; 2003, No. 867, § 2; 2005, No. 256, § 5.

A.C.R.C. Notes. Acts 2003, No. 867, § 1 provided: "The purpose of this act is to revise Arkansas law regarding the penalties for possession of illegal drugs."

Acts 2005, No. 256, § 1 provided: "The

General Assembly of the State of Arkansas finds that:

"(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

"(2) The citizens of Arkansas are entitled to the maximum protection practicable from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

"(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine."

Amendments. The 2001 amendment by No. 1209 inserted "or nine (9) grams of pseudoephedrine or phenylpropanolamine, or their" in (a); inserted "pseudoephedrine, or phenylpropanolamine, or their" in (a)(1), (a)(3) and (a)(4); substituted "under the act" for "thereunder" in (a)(2); substituted "department" for "Arkansas Department of Finance and Administration" in (a)(4); and inserted present (b) and redesignated the former (b) as (c).

The 2001 amendment by No. 1782 substituted "or nine (9) grams ... or their salts" for "its salts" in the introductory language of (a); substituted "pseudoephedrine, or phenylpropanolamine, or their salts" for "its salts" in (a)(1), (a)(3), and (a)(4); deleted "Arkansas" preceding "Department of Finance" in (a)(2) and (a)(3); inserted present (b) and redesignated the remaining subsection; and made minor stylistic changes throughout.

The 2003 amendment redesignated former (a)(4) as present (a)(4)(A); in present (a)(4)(A), inserted "meets one (1) of the requirements in subdivision (a)(4)(B) of this section and"; and added (a)(4)(B).

The 2005 amendment added "or other healthcare professional with prescriptive authority, or as authorized pursuant to § 5-64-1103" at the end of (a)(1); inserted "products exempted under § 5-64-1103(b)(1) and (2)" in (a)(2); inserted "or other healthcare professional with prescriptive authority" in (a)(3) and (a)(4)(A); and made related changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Controlled Substances, 26 UALR L.J. 366.

CASE NOTES

ANALYSIS

Construction with other law.
Evidence held sufficient.

Construction With Other Law.

Iodine is not drug paraphernalia because it is merely a drug ingredient and § 5-64-101(v), as a general statute, is required to yield to the more specific statutes regarding drug ingredients in § 5-64-1102 and this section; therefore, an owner's motion for a directed verdict should have been granted because money found during a body search was not found in close proximity to drug paraphernalia. \$ 735 in *U.S. Currency v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 265 (Mar. 23, 2005).

Evidence Held Sufficient.

Defendant store manager's possession of five cases of pseudoephedrine pills, out-

side of the store licensed to sell them, was sufficient to sustain her conviction for possession of more than five grams of ephedrine. *Ford v. State*, 75 Ark. App. 126, 55 S.W.3d 315 (2001).

Where the total amount of pseudoephedrine found at defendant's residence was 7.5 grams, when considered with other evidence, there was sufficient evidence from which the jury could conclude that defendant possessed ephedrine with intent to manufacture. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003).

In a case involving over-possession of pseudoephedrine under subsection (a) of this section, there was sufficient evidence to support a conviction where defendant exercised care and control over the items in question, despite the fact that a van was not his, and the drugs were found under the passenger's seat; evidence showed that defendant was acting suspi-

ciously, and he was the only occupant in the van. *Lytle v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 450 (June 8, 2005).

5-64-1102. Possession with intent to manufacture — Unlawful distribution.

(a)(1) It is unlawful for a person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, or salts of optical isomers with intent to manufacture methamphetamine.

(2) Any person who violates a provision of subdivision (a)(1) of this section is guilty of a Class D felony.

(b)(1) It is unlawful for a person to sell, transfer, distribute, or dispense any product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers if the person:

(A) Knows that the purchaser will use the product as a precursor to manufacture methamphetamine or another controlled substance; or

(B) Sells, transfers, distributes, or dispenses the product with reckless disregard as to how the product will be used.

(2) Any person who violates a provision of subdivision (b)(1) of this section is guilty of a Class D felony.

History. Acts 1997, No. 565, § 2; 2001, No. 1209, § 4.

Amendments. The 2001 amendment inserted the subdivision (a)(1) and (a)(2)

designations; substituted “subdivision (a)(1) of this section” for “this section” in (a)(2); and added (b).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Construction with other law.
Elements of offense.

Construction With Other Law.

Iodine is not drug paraphernalia because it is merely a drug ingredient and § 5-64-101(v), as a general statute, is required to yield to the more specific statutes regarding drug ingredients in § 5-64-1101 and this section; therefore, an owner’s motion for a directed verdict should have been granted because money found during a body search was not found in close proximity to drug paraphernalia. § 735 in *U.S. Currency v. State*, — Ark.

App. —, — S.W.3d —, 2005 Ark. App. LEXIS 265 (Mar. 23, 2005).

Elements of Offense.

Trial court did not err in failing to give a lesser-included offense instruction because possession of pseudoephedrine with intent to manufacture methamphetamine under subdivision (a)(1) of this section was not a lesser-included offense of possession of drug paraphernalia with intent to manufacture methamphetamine under § 5-64-403(c)(5); the plain language of the two statutes indicates that they contain different elements. *Autrey v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 165 (Feb. 23, 2005).

5-64-1103. Sales limits.

(a) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a)(3) and (4), to knowingly dispense, sell, transfer, or otherwise furnish in a single transaction a product containing ephedrine, pseudoephedrine, or phenylpropanolamine except in a licensed pharmacy by a licensed pharmacist or a registered pharmacy technician.

(b) Unless the product has been rescheduled pursuant to § 5-64-212(c), this section does not apply to a retail distributor sale for personal use of a product:

(1) That the Division of Health of the Department of Health and Human Services, in collaboration with the Arkansas State Board of Pharmacy, upon application of a manufacturer, exempts by rule from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine or its salts or precursors; or

(2) Containing ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form if the drug is dispensed, sold, transferred, or otherwise furnished in a single transaction limited to no more than three (3) packages, with any single package containing not more than ninety-six (96) liquid capsules or liquid gel capsules or not more than three grams (3 g) of ephedrine or pseudoephedrine base.

(c)(1) A pharmacy shall maintain a written or electronic log or receipts of transactions involving the sale of ephedrine, pseudoephedrine, or phenylpropanolamine.

(2) A person purchasing, receiving, or otherwise acquiring ephedrine, pseudoephedrine, or phenylpropanolamine is required to:

(A) Produce current and valid proof of identity; and

(B) Sign a written or electronic log or receipt that documents the date of the transaction, the name of the person, and the quantity of pseudoephedrine or ephedrine purchased, received, or otherwise acquired.

(d) Unless pursuant to a valid prescription, it is unlawful for a licensed pharmacist or a registered pharmacy technician to knowingly dispense, sell, transfer, or otherwise furnish in a single transaction:

(1) More than three (3) packages of one (1) or more products that contain ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers;

(2) Any single package of any product that contains ephedrine, pseudoephedrine, or phenylpropanolamine, that contains more than ninety-six (96) pills, tablets, gelcaps, capsules, or other individual units or more than three grams (3 g) of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller;

(3) Any product containing ephedrine, pseudoephedrine, or phenylpropanolamine, unless:

(A) The product is sold in a package size of not more than three grams (3 g) of ephedrine, pseudoephedrine, or phenylpropanolamine

base and is packaged in a blister pack, each blister containing not more than two (2) dosage units;

(B) When the use of a blister pack is technically infeasible, that is packaged in a unit dose packet or pouch; or

(C) In the case of a liquid, the drug is sold in a package size of not more than three grams (3 g) of ephedrine, pseudoephedrine, or phenylpropanolamine base; or

(4)(A) Any product containing ephedrine, pseudoephedrine, or phenylpropanolamine to any person under eighteen (18) years of age, unless the person is purchasing an exempt product under subdivision (b)(1) or (2) of this section.

(B) The person making the sale shall require proof of age from the purchaser, unless from the purchaser's outward appearance the person would reasonably presume the purchaser to be twenty-five (25) years of age or older.

(e)(1) Any person who violates subsections (a) or (d) of this section is guilty of a Class A misdemeanor and may also be subject to a civil fine not to exceed five thousand dollars (\$5,000).

(2)(A) The prosecuting attorney may waive any civil penalty under this section if a person establishes that he or she acted in good faith to prevent a violation of this section, and the violation occurred despite the exercise of due diligence.

(B) In making this determination, the prosecuting attorney may consider evidence that an employer trained employees how to sell, transfer, or otherwise furnish substances specified in this subchapter in accordance with applicable laws.

(f)(1)(A) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a) of this section, to knowingly purchase, acquire, or otherwise receive in a single transaction:

(i) More than three (3) packages of one (1) or more products that the person knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers; or

(ii) Any single package of any product that the person knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, that contains more than ninety-six (96) pills, tablets, gelcaps, capsules, or other individual units or more than three grams (3 g) of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller.

(B) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a), to knowingly purchase, acquire, or otherwise receive more than five grams (5 g) of ephedrine or nine grams (9 g) of pseudoephedrine or phenylpropanolamine within any thirty-day period.

(2) Any person who violates a provision of subdivisions (f)(1)(A) or (B) of this section is guilty of a Class A misdemeanor.

(g) As used in this subchapter:

(1) "Ephedrine", "pseudoephedrine", and "phenylpropanolamine" mean any product containing ephedrine, pseudoephedrine, or phenyl-

propanolamine or any of their salts, isomers, or salts of isomers, alone or in a mixture;

(2)(A) “Proof of age” or “proof of identity” means any document issued by a governmental agency that contains a description of the person or a photograph of the person, or both, and gives the person’s date of birth.

(B) “Proof of age” or “proof of identity” includes, without being limited to, a passport, military identification card, or driver’s license;

(3)(A) “Retail distributor” means a grocery store, general merchandise store, drugstore, convenience store, or other related entity, the activities of which, as a distributor of ephedrine, pseudoephedrine, or phenylpropanolamine products, are limited exclusively to the sale of ephedrine, pseudoephedrine, or phenylpropanolamine products for personal use, both in number of sales and volume of sales, either directly to walk-in customers or in face-to-face transactions by direct sales.

(B) “Retail distributor” includes any person or entity that makes a direct sale or has knowledge of the direct sale.

(C) “Retail distributor” does not include:

(i) Any manager, supervisor, or owner not present and not otherwise aware of the direct sale; or

(ii) The parent company of a grocery store, general merchandise store, drugstore, convenience store, or other related entity if the parent company is not involved in direct sales regulated by this subchapter; and

(4) “Sale for personal use” means the sale in a single transaction to an individual customer for a legitimate medical use of a product containing ephedrine, pseudoephedrine, or phenylpropanolamine in a quantity at or below that specified in subsection (a) of this section, and includes the sale of those products to an employer to be dispensed to employees from a first-aid kit or medicine chest.

(h) Nothing in this section prohibits a person under eighteen (18) years of age from possessing and selling a product described in subsections (a) and (b) of this section as an agent of the minor’s employer acting within the scope of the minor’s employment.

History. Acts 2001, No. 1209, § 5; 2003, No. 277, §§ 1, 2; 2005, No. 256, § 6.

A.C.R.C. Notes. Acts 2005, No. 256, § 1, provided: “The General Assembly of the State of Arkansas finds that:

“(1) Pseudoephedrine and ephedrine are known medicinal ingredients, with known scientific evidence of pharmacological effect, and have known currently accepted medical use in treatment in the United States;

“(2) The citizens of Arkansas are entitled to the maximum protection practica-

ble from the harmful effects of methamphetamine abuse and the harmful effects of excessive and improper exposure to illicit clandestine laboratories for the manufacture of methamphetamine; and

“(3) The protection of the citizens of Arkansas will be increased by controlling specific precursor ingredients, ephedrine, pseudoephedrine, and phenylpropanolamine utilized to manufacture methamphetamine.”

Amendments. The 2003 amendment added “unless the person is purchasing a

pediatric product intended for a child” at the end of (a)(4)(A); and deleted “drug” preceding “product containing” in (e)(1). The 2005 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

SUBCHAPTER 12 — NITROUS OXIDE

SECTION.
5-64-1201. Possession.
5-64-1202. Distribution.

SECTION.
5-64-1203. Exemptions.

A.C.R.C. Notes. References to “this chapter” in subchapters 1-10 may not apply to this subchapter which was enacted subsequently.

Cross References. Application for dental use permit, § 17-82-503.

5-64-1201. Possession.

Any person is guilty of a Class A misdemeanor who possesses any substance in subdivisions (1)-(3) of this section with the intent to breathe, inhale, ingest, or use the substance for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of in any manner changing, distorting, or disturbing his or her audio, visual, or mental processes or who knowingly and with the intent to do so is under the influence of:

- (1) Nitrous oxide, commonly known as “laughing gas”;
- (2) Any compound, liquid, or chemical that contains nitrous oxide; or
- (3) Any amyl nitrite, commonly known as “poppers” or “snappers”.

History. Acts 1997, No. 355, § 1; 2001, No. 1553, § 13.

Amendments. The 2001 amendment rewrote this section.

5-64-1202. Distribution.

Any person, firm, corporation, limited liability company, or association is guilty of a Class A misdemeanor if that person, firm, corporation, limited liability company, or association intentionally sells, offers for sale, distributes, or gives away the following substances for the purpose of inducing or aiding another person to breathe, inhale, ingest, use, or be under the influence of the substances for the purposes prohibited in § 5-64-1201:

- (1) Nitrous oxide;
- (2) Any compound, liquid or chemical, that contains nitrous oxide; or
- (3) Any amyl nitrate.

History. Acts 1997, No. 355, § 2; 2001, No. 1553, § 14. **Amendments.** The 2001 amendment rewrote this section.

5-64-1203. Exemptions.

- (a) A prohibitive provision in this subchapter does not apply to the possession and use of these substances prescribed as part of the practice of dentistry or as part of the care or treatment of a disease, condition, or injury by a licensed physician or to their use as part of a manufacturing process or industrial operation.
- (b) A prohibitive provision in this subchapter shall not apply to the possession, use, or sale of nitrous oxide as a propellant in food preparation for restaurant, food service, or a houseware product.

History. Acts 1997, No. 355, § 3.

SUBCHAPTER 13 — ANHYDROUS AMMONIA

SECTION.	SECTION.
5-64-1301. Possession of anhydrous ammonia in unlawful container.	5-64-1302. Agricultural use as affirmative defense.
	5-64-1303. Applicability of subchapter.

A.C.R.C. Notes. References to “this chapter” in subchapters 1-10 may not apply to this subchapter which was enacted subsequently.

5-64-1301. Possession of anhydrous ammonia in unlawful container.

Any person who knowingly possesses anhydrous ammonia in a container that does not comply with the regulations of the Boiler Inspection Division of the Department of Labor for the containment of anhydrous ammonia is guilty of a Class B felony.

History. Acts 1999, No. 909, § 1.

CASE NOTES

Cited: Dondanville v. State, 85 Ark. App. 532, 157 S.W.3d 571 (2004).

5-64-1302. Agricultural use as affirmative defense.

It is an affirmative defense to prosecution under this subchapter that a chemical is possessed for the sole purpose of agricultural use.

History. Acts 1999, No. 909, § 2.

5-64-1303. **Applicability of subchapter.**

The provisions of this subchapter do not apply to a trained chemist working in a properly equipped research laboratory in an education, government, or corporate settings.

History. Acts 1999, No. 909, § 3.

CHAPTER 65
DRIVING WHILE INTOXICATED

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. CHEMICAL ANALYSIS OF BODY SUBSTANCES.
- 3. UNDERAGE DRIVING UNDER THE INFLUENCE LAW.
- 4. ADMINISTRATIVE DRIVER'S LICENSE SUSPENSION.

A.C.R.C. Notes. References to "this chapter" in subchapters 1 and 2 may not apply to § 5-65-208 and subchapter 3 which were enacted subsequently.

RESEARCH REFERENCES

- Am. Jur.** 7A Am. Jur. 2d, Auto., § 356 et seq.

Ark. L. Rev. Notes, State v. Brown: Use of Prior Uncounseled Convictions to Enhance for Subsequent Offenses Under the Omnibus DWI Act, 38 Ark. L. Rev. 688.
- C.J.S.** 61A C.J.S., Motor Veh., § 1382 et seq.

UALR L.J. Arkansas Law Survey, Antley, Criminal Law, 9 UALR L.J. 119.

Survey — Criminal Procedure, 10 UALR L.J. 567.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 5-65-101. Omnibus DWI Act — Application.
- 5-65-102. Definitions.
- 5-65-103. Unlawful acts.
- 5-65-104. Seizure, suspension, and revocation of license — Temporary permits — Ignition interlock restricted license.
- 5-65-105. Operation of motor vehicle during period of license suspension or revocation.
- 5-65-106. Impoundment of license plate.
- 5-65-107. Persons arrested to be tried on charges — No charges reduced — Filing citations.
- 5-65-108. No probation prior to adjudication of guilt.
- 5-65-109. Presentencing report.

SECTION.

- 5-65-110. Record of violations and court actions — Abstract.
- 5-65-111. Prison terms — Exception.
- 5-65-112. Fines.
- 5-65-113. [Repealed.]
- 5-65-114. Inability to pay — Alternative public service work.
- 5-65-115. Alcohol treatment or education program — Fee.
- 5-65-116. Denial of driving privileges for minor — Restricted permit.
- 5-65-117. Seizure and sale of motor vehicles.
- 5-65-118. Additional penalties — Ignition interlock devices.
- 5-65-119. Distribution of fee.
- 5-65-120. Restricted driving permit.

Effective Dates. Acts 1983, No. 549, § 19: Mar. 21, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval." Emergency clause held valid in *State v. Ziegenbein*, 282 Ark. 162, 666 S.W.2d 698 (1984).

Acts 1983, No. 918, § 16: Mar. 30, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1985, No. 113, § 3: Feb. 14, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that Section 13 of Act 549 of 1983 prescribed only minimum periods of sus-

pension of motor vehicle operator licenses upon first and subsequent offenses of driving while intoxicated and contain no maximum periods of suspension; that as a result of one or more lower court decisions in the State, serious concern has arisen concerning the constitutionality of the Legislature prescribing only minimum periods of suspension and prescribing no maximum periods; that this Act is designed to prescribe minimum and maximum periods of motor vehicle operator license suspension for violations of Act 549 of 1983 and should be given effect immediately in order to remove constitutional doubt concerning the license suspension provisions of that Act. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 93, § 6: Nov. 17, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that additional enforcement mechanisms are urgently needed to deter persons under 18 years of age from illegally using or dealing in drugs; that this Act provides an additional enforcement mechanism; and that this Act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use and sale of drugs. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1257, § 11: Apr. 20, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that federal mandates require the loss of federal highway funds without implementation of a system of suspending the driving privileges of persons holding such privileges granted by this State and found guilty of certain drug offenses, whether such finding occurred in this state or out-of-state, and that additional enforcement provisions are urgently needed to deter persons illegally using or dealing in drugs; that this Act will provide that additional enforcement mechanism; and that this Act should go into effect immediately in order

to meet the requirements of the federal law and to grant law enforcement officers and courts greater flexibility in dealing with the illegal use and sale of drugs. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 9: Mar. 27, 1995: Emergency clause provided: "It is hereby found and determined by the General Assembly that this act provides for administrative revocation and suspension of drivers' licenses for persons charged with the offense of driving while intoxicated; that based on Arkansas Crime Information Center statistics on DEI arrests, the Office of Driver Services could anticipate up to sixteen thousand (16,000) hearings if everyone arrested requested a hearing; that funds will be necessary for additional staff to handle this program along with significant costs to prepare for and implement this program; and that this act is necessary immediately in order to insure that sufficient funds are available for the financial stability of this program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 5(a): Sections 1, 3, and 4 effective for all arrests or offenses occurring on or after July 1, 1996.

Acts 1995, No. 802, § 5(b): Section 2 effective July 1, 1995.

Acts 1995, No. 1032, § 13: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly, that in order for the Department of Health to become more efficient in accounting and budgetary practices due to the transfer of the Bureau of Alcohol and Drug Abuse Prevention, changes in various funds are needed; and that the provisions of this Act provide such changes. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided:

"It is hereby found and determined by the General Assembly of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 830, § 5: Mar. 26, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act provides for proof of attendance at and completion of an alcohol education or treatment program as a prerequisite for reinstatement of a license administratively suspended or revoked; that the law does not now explicitly authorize such programs for administrative suspension or revocation; that lives will be placed in jeopardy if individuals whose license has been administratively suspended or revoked are not required to furnish proof of attendance of such programs prior to reinstatement of license; that rehabilitation of DWI offenders whose license has been administratively suspended or revoked is necessary for the welfare of the offender as well as others utilizing this State's roadways. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 1325, § 7: Apr. 10, 1997. Emergency clause provided: "It is hereby found and determined by the Eighty-First General Assembly of the State of Arkansas that current ambiguities in Arkansas

law create confusion and possible conflicts which would endanger the enforcement of certain DWI penalties; that enforcement of driving while intoxicated laws serves as an extreme deterrent to that kind of conduct which threatens the health and safety of Arkansas' driving public; and that these clarifications of Arkansas law should take effect immediately to prevent any possible forestalling of the enforcement of Arkansas DWI laws. Therefore, in order to remove the ambiguities in those important laws, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved or vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1508, § 19: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act makes various technical corrections in the Arkansas Code; that this act further clarifies the law to provide that the Arkansas Code Revision Commission may correct errors resulting from enactments of prior sessions; and that this act should go into effect immediately in order to be applicable during the codification process of the enactments of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 1715, § 2: emergency failed to pass. Emergency clause provided: "It is found and determined by the General Assembly that there is a substantial risk that persons convicted of driving while intoxicated will continue to drive while their licenses are suspended. Stiff-

ening penalties will reduce the occurrences of driving under suspended licenses, thus making the state's highways safer. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1001, § 5: Apr. 1, 2003: Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the state is experiencing severe revenue shortages which are affecting the operation of many state agencies; that the Department of Arkansas State Police has been hit hard by these shortages which have hampered its ability to replace worn out automobiles and other equipment, not to mention its ability to attract recruits because beginning salaries have remained below average; and that this act is immediately necessary because it provides some much needed additional monies to the Department of Arkansas State Police and should be given immediate effect. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2003, No. 1462, § 4: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that if the fees that are raised by this bill do not become effective by July 1, 2003, there will be a shortfall in the funding needed to maintain the alcoholism education programs; that these programs are mandated by law for those individuals that have their license suspended or revoked following an arrest for driving while intoxicated; and that these programs provide educational

instruction and are necessary to protect the public health and welfare. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003.”

Acts 2005, No. 1992, § 6: Apr. 11, 2005. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that currently there exists some confusion as to whether the fees collected for the reinstatement of a suspended or revoked driver’s license should be collected for each offense or for each reinstatement; that due to the confusion, state agencies have not been allowed to collect the revenue that they antici-

pated for reinstatement fees which is causing a negative fiscal impact; and that this act is immediately necessary to clarify the law to prevent the impairment of agency operations due to a loss of anticipated revenue. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

RESEARCH REFERENCES

ALR. Reckless driving as lesser included offense of driving while intoxicated or similar charge. 10 ALR 4th 1252.

Validity of routine roadblocks by state or local police for purpose of discovery of

vehicular or driving violations. 37 ALR 4th 10.

Failure to restrain drunk driver as ground of liability of state or local government unit or officer. 48 ALR 4th 320.

CASE NOTES

ANALYSIS

Purpose.

Liability.

Purpose.

The General Assembly’s intent when enacting this subchapter was to protect the public from the damage and tragedies that drunken driving can cause; the fact that an offender is not on a roadway is irrelevant. *Fitch v. State*, 313 Ark. 122, 853 S.W.2d 874 (1993).

Liability.

Liability not imposed on those who sell intoxicants for injuries caused by those who drink intoxicants. *Yancey v. Beverage House of Little Rock, Inc.*, 291 Ark. 217, 723 S.W.2d 826 (1987), but see *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349, (1997).

Cited: *Deweese v. State*, 26 Ark. App. 126, 761 S.W.2d 945 (1988).

5-65-101. Omnibus DWI Act — Application.

(a) This act shall be known as the “Omnibus DWI Act”.

(b) The provisions of this act govern the prosecution and administrative proceedings for an offense defined by this act and committed after March 21, 1983.

(c)(1)(A) The provisions of this act do not apply to an offense committed prior to March 21, 1983.

(B) An offense committed prior to March 21, 1983, shall be construed and punished in accordance with the law existing at the time of the commission of the offense.

(2) However, any plea of guilty or nolo contendere and any finding of guilty of driving while intoxicated within three (3) years prior to March

21, 1983, shall be counted in determining the number of prior offenses for the purposes of enhancing the penalties provided by this act for violating § 5-65-103.

History. Acts 1983, No. 549, § 1; A.S.A. 1947, § 75-2501.

Meaning of "this act". Acts 1983, No.

549, codified as §§ 5-65-101 — 5-65-105, 5-65-107 — 5-65-112, 5-65-115, 5-65-202 — 5-65-206, 12-6-101, 12-6-102.

CASE NOTES

ANALYSIS

Purpose.

Legislative intent.

Purpose.

The legislative intent of the Omnibus DWI Act of 1983, as stated in subsection (c), was to enhance penalties by using convictions under the prior driving while under the influence act; thus, previous convictions for driving while under the influence of intoxicants under prior law may be used as prior offenses for enhancement purposes. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Legislative Intent.

The legislature has always considered

DWI to be a traffic offense and only removed it from the list of traffic offenses under § 27-50-302 when DWI became the focus of an entire act within itself. *Hill v. State*, 315 Ark. 297, 868 S.W.2d 44 (1993).

Cited: *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984); *Spicer v. City of Fayetteville*, 284 Ark. 315, 681 S.W.2d 369 (1984); *Doty v. State*, 285 Ark. 270, 686 S.W.2d 413 (1985); *Sides v. State*, 285 Ark. 323, 686 S.W.2d 434 (1985); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985); *Wilson v. State*, 286 Ark. 430, 692 S.W.2d 620 (1985); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986).

5-65-102. Definitions.

As used in this act:

(1)(A) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VI.

(B) The fact that any person charged with a violation of this act is or has been entitled to use that drug or controlled substance under the laws of this state does not constitute a defense against any charge of violating this act;

(2) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians;

(3) "Sworn report" means a signed and written statement of a certified law enforcement officer, under penalty of perjury, on a form provided by the Director of the Department of Finance and Administration; and

(4) "Victim impact statement" means a voluntary written or oral statement of a victim, or relative of a victim, who has sustained serious injury due to a violation of this act.

History. Acts 1983, No. 549, § 2; A.S.A. 1947, § 75-2502; Acts 1987, No. 765, § 1; 1997, No. 1325, § 1.

Publisher's Notes. Schedules I through VI referred to in this section exist pursuant to the Uniform Controlled Substances Act, § 5-64-101 et seq. The schedules are partly codified and partly governed by administrative regulation. The Director of the Division of Health of the

Department of Health and Human Services or his or her authorized agent revises and republishes the schedules annually. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

Meaning of "this act". See note to § 5-65-101.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 10 UALR L.J. 559.

CASE NOTES

ANALYSIS

Constitutionality.
Intoxicated.

- In general.
- Evidence.
- Intoxicant.

Constitutionality.

The term "intoxicant" as used in subdivision (1) of this section is not unconstitutionally vague. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

Intoxicated.

—In General.

Due process requires only fair warning, not actual notice; the definition of "intoxicated" in this section fairly warns a person of ordinary intelligence that he is in jeopardy of violating the law if he drives a motor vehicle after consuming a sufficient quantity of alcohol to alter his reactions, motor skills and judgment to the extent that his driving constitutes a substantial danger to himself or others. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

A law is held to be vague when it leaves the police or the factfinder free to decide, without a fixed standard, what is prohibited; the definition of intoxicated, set out in this section, is a sufficient standard for police enforcement and for ascertainment of guilt. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

The driver's skills under normal conditions are immaterial; it is driving with those skills impaired by intoxication to the extent that it causes the danger outlined in this section that brings the driver

within the proscribed activity. *Oliver v. State*, 284 Ark. 413, 682 S.W.2d 745 (1985).

—Evidence.

Evidence held sufficient to find that the defendant was intoxicated. *Oliver v. State*, 284 Ark. 413, 682 S.W.2d 745 (1985); *Sparks v. State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988); *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988).

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different ways of proving a single violation, and proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Evidence of DWI, fifth offense, held sufficient where defendant refused to submit to a breathalyzer test, failed field sobriety tests, and the officers testified that they smelled intoxicants on defendant's person. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Where the evidence showed that defendant committed several traffic offenses when leaving a liquor store parking lot, refused to stop until he reached his residence, had red and bloodshot eyes, smelled like alcohol, and was unable to stand, there was sufficient evidence to support a conviction for driving while intoxicated; moreover, evidence that defen-

dant refused a breathalyzer test was admissible to show intoxication based on a consciousness of guilt. *Hassan v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 528 (June 29, 2005).

—**Intoxicant.**

The addition of the term “any intoxicant” to “alcohol, a controlled substance, or a combination thereof” has not made the definition vague; a person of ordinary intelligence knows that the use of a substance tending to put him or her in the condition described in present subdivision (2) of this section constitutes use of an “intoxicant” and that being in control of a motor vehicle shortly thereafter may violate the law. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

5-65-103. Unlawful acts.

(a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.

(b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person’s breath or blood was eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

History. Acts 1983, No. 549, § 3; A.S.A. 1947, § 75-2503; Acts 2001, No. 561, § 2.

Amendments. The 2001 amendment substituted “the alcohol concentration ... § 5-65-204” for “there was one-tenth of one percent (0.10%) or more by weight of

The General Assembly has recognized in § 5-60-116 that toluene is an intoxicant. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

Cited: *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985); *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987); *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989); *Freeman v. City of DeWitt*, 301 Ark. 581, 787 S.W.2d 658 (1990); *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993); *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

alcohol in the person’s blood as determined by a chemical test of the person’s blood, urine, breath, or other bodily substance” in (b).

Meaning of “this act”. See note to § 5-65-101.

RESEARCH REFERENCES

ALR. Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 ALR 5th 491.

Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 ALR 5th 491.

UALR L.J. Survey — Criminal Law, 12 UALR L.J. 183.

Seventeenth Annual Survey of Arkansas Law — Constitutional Law, 17 UALR L.J. 450.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Construction.

All-terrain vehicles.

Burden of proof.

Charging document, citation, etc.

Competency for other purposes.

Double jeopardy.

Elements of offense.

Evidence.

—In general.

—Confessions.

—Intoxicated.

—Police.

Horizontal gaze nystagmus test.

Instructions.

Intoxicated.

Legislative intent.

Lesser-included offenses.

Mental state.

Operation or control of vehicle.

Place of operation.

Portable breath test.

Prohibited conduct.

Right to counsel.

Separate offenses.

Constitutionality.

The Omnibus DWI Act of 1983 is not unconstitutional on its face or as applied, in that subsection (b) establishes a conclusive presumption of guilt. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Subsection (b) is not void for vagueness. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

Subsection (b) meets due process requirements. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The blood alcohol measurement standard in subsection (b) bears a reasonable relationship to the legitimate state interest in protecting the safety of its citizens. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The state has a rational basis in protecting public safety, and to that end, the General Assembly has determined that a driver with a blood alcohol content of .10% or more constitutes a serious and immediate threat to the safety of all citizens; the Omnibus DWI Act of 1983 is simply a reasonable means of protecting the public safety. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The Omnibus DWI Act is not unconstitutional on the ground that a machine rather than a jury of peers is the basis for the conviction since it is up to the jury to determine whether the defendant was operating a motor vehicle and whether his blood alcohol content was in fact greater than the statutorily set standard. *Girdner v. City of Kensett*, 285 Ark. 70, 684 S.W.2d 808 (1985).

Subsection (a) is not unconstitutionally vague. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

Subsection (b) which makes it a violation per se to drive with a blood alcohol content of .10% or more is not unconstitutionally vague. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

In General.

City attorney of a first-class city had authority to prosecute a state misdemeanor violation because he was acting as a de facto official. *Chronister v. State*, 55 Ark. App. 93, 931 S.W.2d 444 (1996).

Construction.

Under § 5-65-206(a)(2), if a person's blood alcohol content is lower than that required by subsection (b) of this section, other competent evidence may be used to show intoxication under subsection (a). *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Although defendant was charged with DWI second offense but convicted instead of DWI first offense, the defendant was not acquitted of the "charge" of DWI second offense under § 5-65-104; once the municipal court convicted defendant of DWI first offense, he simply had two separate convictions of violating this section, since DWI first offense is just as much a violation of this section as is DWI second offense. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

Critical point for counting driving while intoxicated (DWI) offenses is at the sentencing phase of the DWI case, not the date that the crime is committed, and § 5-65-111(b)(3) plainly contemplates determining total DWI offenses within five years of the first offense and, to the extent Ark. Model Jury Instruction Crim. § 2d 9201.4 is in conflict with the method of counting prior offenses, § 5-65-111(b) prevails. *State v. Sola*, 354 Ark. 76, 118 S.W.3d 95 (2003).

Subsection (b), as amended in 2001, sets the legal limit for blood alcohol concentration and must be read in conjunction with § 5-65-204(a)(1), which defines the alcohol concentration computation; hence, where defendant stipulated that his blood alcohol concentration as revealed in breathalyzer test results was 0.109, his conviction for per se violation of subsection (b) was affirmed on appeal. *Bramlett v. State*, 356 Ark. 200, 148 S.W.3d 278 (2004).

All-terrain Vehicles.

An all-terrain vehicle meets the definition of a motor vehicle as set out in § 27-14-207, since all-terrain vehicles are self-propelled and do not require rails; the term motor vehicle, as used in this section, also includes all-terrain vehicles. *Fitch v. State*, 313 Ark. 122, 853 S.W.2d 874 (1993).

Burden of Proof.

Subsection (b) does not lessen the state's burden of proof, and each defendant is presumed innocent until the state proves beyond a reasonable doubt that he is guilty of committing the prohibited act of driving with .10% or more alcoholic content in the blood. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Subsection (b) does not deprive the accused of the presumption of innocence by shifting the burden of proof to the defendant and creating an irrebuttable presumption of guilt, for each defendant is presumed innocent until the state proves beyond a reasonable doubt that he is guilty of committing the prohibited act of driving with .10% or more alcoholic content in the blood. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

The state must prove not only that defendant was intoxicated, but also that he operated or was in actual physical control of a motor vehicle while intoxicated. *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988).

To convict defendant of driving while intoxicated the state has to prove that defendant was driving or in actual physical control of a motor vehicle, that defendant's driving skills were sufficiently impaired to create a substantial danger to himself and others, and that the impaired driving skills were the result of the ingestion of a controlled substance. *Roach v. State*, 30 Ark. App. 119, 783 S.W.2d 376 (1990).

To convict defendant of driving while intoxicated the state has to prove that defendant was driving or in actual physical control of a motor vehicle, that defendant's driving skills were sufficiently impaired to create a substantial danger to himself and others, and that the impaired driving skills were the result of the ingestion of a controlled substance. *Roach v. State*, 30 Ark. App. 119, 783 S.W.2d 376 (1990).

This section does not require that law enforcement officers actually witness an intoxicated person driving or exercising control of a vehicle; it is well-settled that the state may prove by circumstantial evidence whether a person operated or was in actual physical control of a vehicle. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

Charging Document, Citation, Etc.

A charging document, which reflected that the defendant was "charged with the offense of Driving While Intoxicated (DWI) one" was sufficient for a conviction under either subsection (a) or (b), even though the evidentiary requirements of the subsections are different. *Wilson v. State*, 285 Ark. 257, 685 S.W.2d 811 (1985).

Citations which charged defendant with "Driving Under the Influence of Intoxicants" were not void for lack of specificity in that they did not indicate under which subsection of this section of the Omnibus DWI Act the defendant was charged. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

Where the actual charge was "D.W.I. 5-65-103," and the citation did not specify either subsection of this section, since subsections (a) and (b) are, legally, two different ways to prove a single violation, it does not matter if defendant is charged under subsection (b), but convicted under subsection (a). *Greer v. State*, 310 Ark. 522, 837 S.W.2d 884 (1992), overruled in part on other grounds by *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995), overruled on other grounds by *Igwe v. State*, 312 Ark. 220, 849 S.W.2d 462 (1993), overruled in part on other grounds by *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995).

A charge of "DWI one" is sufficient for a conviction under either subsection (a) or (b), even though the evidentiary requirements of the subsections are different. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Municipal court erred and prejudiced defendant charged with driving while intoxicated (DWI) when it changed the charge to driving under the influence (DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated § 5-65-107; and the circuit court erred in trying and

convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under § 16-19-1105. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997).

Defendant's right to a speedy trial under Ark. R. Crim. P. 30.1 was violated when his trial for driving while intoxicated in violation of § 5-65-103 commenced on the 600th day following his arrest. *Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003).

Competency for Other Purposes.

Fact that defendant's blood alcohol level exceeded .10% at time of trial did not require conclusion under this section that he was too intoxicated to stand trial; this section provides that it is unlawful for any person to operate a motor vehicle if his blood alcohol level is .10 percent or more, but does not declare or imply that a person in such condition is incompetent for any other purposes. *Meekins v. State*, 34 Ark. App. 67, 806 S.W.2d 9 (1991), supplemental op., reh'g denied, 1991 Ark. App. LEXIS 212 (1991).

Double Jeopardy.

Driving while intoxicated is an essential component of the crime of negligent homicide, since it is necessary to prove that defendant was driving while intoxicated in order to prove that he had committed negligent homicide; consequently, a defendant cannot be convicted of both offenses. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

Elements of Offense.

Trial court properly provided copies of defendant's prior DWI convictions to the jury for their examination because the fact of prior DWI convictions was an element of the crime of DWI, fourth offense, to be determined by the jury; although the trial court had to determine the admissibility of evidence of the prior convictions, it was up to the jury to determine that the evidence established that element of the offense. *Fields v. State*, 81 Ark. App. 351, 101 S.W.3d 849 (2003).

Evidence.

—In General.

Evidence to show intoxication held admissible. *Canard v. State*, 174 Ark. 918, 298 S.W. 24 (1927) (decision under prior law); *Wiyott v. State*, 284 Ark. 399, 683

S.W.2d 220 (1985); *Yacono v. State*, 285 Ark. 130, 685 S.W.2d 500 (1985); *Nehle v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988).

Evidence held sufficient to support conviction. *Oliver v. State*, 284 Ark. 413, 682 S.W.2d 745 (1985); *Broyles v. State*, 285 Ark. 457, 688 S.W.2d 290 (1985); *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985); *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987); *Deshazier v. State*, 26 Ark. App. 193, 761 S.W.2d 952 (1988); *Nottingham v. State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989); *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992); *Wilson v. State*, 46 Ark. App. 1, 875 S.W.2d 510 (1994); *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

Proof of the blood alcohol content is not necessary for a conviction under subsection (a), driving while intoxicated; however, such proof is admissible as evidence tending to prove intoxication. *Wilson v. State*, 285 Ark. 257, 685 S.W.2d 811 (1985).

The erroneous admission of breathalyzer test results indicating that defendant's blood-alcohol level was 0.20% was prejudicial where, even though the trial judge said that he was not convicting defendant under subsection (b) but that the conviction was based instead upon subsection (a), the judge did not say that he did not consider the test results. *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985).

The trial court did not err by admitting into evidence a breathalyzer log showing all tests performed on the machine for a period of five days, even though the defendant's blood alcohol content was the highest one recorded on it, where the log was admissible for the purpose of showing calibration of the machine and the defendant's test result, and the judge offered to admonish the jury to disregard the other test results or delete them, but the defendant rejected this offer. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Subsection (b) of this section states that it is unlawful for a person to operate a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood. However, § 5-65-204(a) states that percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one

hundred (100) cubic centimeters of blood. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Officer's testimony was insufficient to establish that gaze nystagmus testing was reliable and generally accepted in the scientific community. *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989).

Evidence held insufficient to support conviction. *Roach v. State*, 30 Ark. App. 119, 783 S.W.2d 376 (1990); *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992).

Where defendant was involved in a one-vehicle accident, had a strong odor of alcohol about his person, his speech was slurred, and the deputy sheriff who questioned defendant testified that shortly after the accident defendant appeared to be "very drunk, very intoxicated," there was substantial evidence to sustain defendant's conviction without considering the result of the blood test. *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990).

Evidence of DWI, second offense, held insufficient where the date of the prior offense was not on the docket sheet introduced into evidence. *Wilson v. State*, 46 Ark. App. 1, 875 S.W.2d 510 (1994).

Prosecutor's remark, "The reason we have this law is so people won't be out there killing our kids" fell well short of any error or prejudice requiring reversal. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different ways of proving a single violation, and proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Although the police officers' testimony regarding their belief that defendant was intoxicated was described by the trial court as "subjective" evidence, it was the province of the jury to determine the weight and credibility of this evidence. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Where defendant was involved in a one-car accident, it was reasonable to infer that the defendant's impaired response could have been caused by his injuries,

and, in light of this inference, the odor of alcohol was insufficient to support the conviction. *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998).

The State is not precluded as a matter of law from producing evidence of intoxication by ingestion of a controlled substance if the information did not specifically allege this method of intoxication. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

A DWI conviction is not dependent upon evidence of blood-alcohol content in view of sufficient other evidence of intoxication. *Wortham v. State*, 65 Ark. App. 81, 985 S.W.2d 329 (1999).

Trial court abused its discretion by excluding defendant's exculpatory testimony about the results of a portable breathalyzer test administered by an officer at the scene of the arrest that allegedly showed defendant's blood-alcohol content was below the legal driving limit. *Elser v. State*, 79 Ark. App. 440, 89 S.W.3d 353 (2002) (decision under prior law).

Defendant's DWI conviction was improper where neither blood test resulted in blood alcohol levels in excess of the then legal limit, there was no testimony concerning speech pattern, appearance of defendant's eyes, any admission of his, or anything else that would support a finding of intoxication; in light of the fact that neither blood test resulted in blood alcohol levels in excess of the then legal limit, the court could not hold that defendant's case was one in which blood alcohol content and a mere allegation of an odor of intoxication was sufficient proof for DWI. *Porter v. State*, 82 Ark. App. 589, 120 S.W.3d 178 (2003).

State failed to present evidence showing that defendant had a blood-alcohol content of 0.10 percent or greater such that there was not substantial evidence to convict defendant under subsection (b); however, there was substantial evidence to convict him under subsection (a) as he was intoxicated and operated a vehicle while intoxicated. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

—Confessions.

Pre-arrest statement by defendant charged with DWI that he was the driver of the vehicle was not a "confession" as that term is used in § 16-89-111(d), because defendant's statement contained no

admission that defendant was intoxicated or that his blood alcohol level was in excess of the legal limit at the time of the accident; defendant's statement that he was the operator of the vehicle merely constituted an admission of one element of the offense of DWI, rather than a confession of the crime. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

—Intoxicated.

Any error by the circuit court in denying defendant's motion in limine to exclude evidence or his refusal to submit to breath testing was harmless as the evidence of his guilt was overwhelming; defendant was passed out at the steering wheel, he could not pass field sobriety tests, and he admitted to drinking alcohol earlier in the evening. *Etheredge v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 107 (Feb. 9, 2005).

Where evidence showed that defendant committed several traffic offenses when leaving a liquor store parking lot, refused to stop until he reached his residence, had red and bloodshot eyes, smelled like alcohol, and was unable to stand, there was sufficient evidence to support a conviction for driving while intoxicated; moreover, evidence that defendant refused a breathalyzer test was admissible to show intoxication based on a consciousness of guilt. *Hassan v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 528 (June 29, 2005).

—Police.

This section does not require law enforcement officers to actually witness an intoxicated person driving or exercising control of a vehicle. *Springston v. State*, 61 Ark. App. 36, 962 S.W.2d 836 (1998).

Trial court erred in admitting evidence that the defendant failed a portable breath test and in admitting the result of a breathalyzer test taken later at a police station where the statutory requirements of §§ 5-65-206 and 5-65-204(d) regarding the administration of blood alcohol tests were not followed. *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003).

Horizontal Gaze Nystagmus Test.

Using the horizontal gaze nystagmus test to identify a precise blood alcohol content under subsection (b) is vastly different from testing to indicate some alcohol in the system for purposes of intoxica-

tion under subsection (a). *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

Where the horizontal gaze nystagmus test administered by police officer was not used to quantify a precise percentage of blood alcohol content but rather to show some indication of alcohol consumption in conjunction with other field sobriety tests, the testimony regarding the results of the test was properly admitted. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

Instructions.

Under §§ 16-89-126(c) and 5-4-103, the defendant was entitled to have a jury fix his sentence for his conviction of driving while intoxicated, and his proffered jury instruction to this effect should have been given. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Defendant was not prejudiced by trial court's refusal to instruct the jury to return separate verdicts for subsections (a) and (b) since the penalty would be the same whether the act is violated by conduct described by (a) or (b); the two conditions are simply two different ways of proving a single violation. *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996).

Intoxicated.

The addition of the term "any intoxicant" to "alcohol, a controlled substance, or a combination thereof" has not made the definition vague; a person of ordinary intelligence knows that the use of a substance tending to put him or her in the condition described in present § 5-65-102(2) constitutes use of an "intoxicant" and that being in control of a motor vehicle shortly thereafter may violate the law. *Thornton v. State*, 317 Ark. 626, 883 S.W.2d 453 (1994).

Evidence held sufficient to establish that the defendant was intoxicated where (1) 2 police officers smelled alcohol on the defendant's breath, (2) the defendant admitted that he consumed alcohol, and (3) although one officer could not recall the specifics of the field sobriety tests he conducted, he indicated that he administered 3 such tests and that the defendant failed all 3. *Felgate v. State*, 63 Ark. App. 76, 974 S.W.2d 479 (1998).

Evidence of intoxication held sufficient where the blood alcohol level shown by a

breathalyzer test was .104, notwithstanding that the officer who administered the breathalyzer test testified that the breathalyzer machine had a plus or minus factor of .01 for the external check, and notwithstanding the contention that the defendant's blood alcohol level could thus have been as low as .094, since the officer also testified that the .01 factor had nothing to do with a personal sample. *Weeks v. State*, 64 Ark. App. 1, 977 S.W.2d 241 (1998).

Evidence of DWI, fifth offense, held sufficient where defendant refused to submit to a breathalyzer test, failed field sobriety tests, and the officers testified that they smelled intoxicants on defendant's person. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Legislative Intent.

It is evident from the history of § 27-49-102(2) that the legislature intended that the offense of DWI not be restricted to the highways of this state; the legislature has consistently intended that DWI constitutes a criminal offense whether it occurs on highways or on private property. *Hill v. State*, 315 Ark. 297, 868 S.W.2d 44 (1993).

Lesser-Included Offenses.

Violation of the implied consent law is not a lesser-included offense of driving while intoxicated, and the offense of driving while intoxicated is not a lesser-included offense of violation of the implied consent law. *Frana v. State*, 323 Ark. 1, 912 S.W.2d 930 (1996).

Driving under the influence (DUI) is not a lesser-included offense of driving while intoxicated, in that DUI requires an additional element of proof of the defendant's age and a different level of intoxication. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997).

Mental State.

The Omnibus Driving While Intoxicated Act of 1983 is valid even though it does not require a culpable mental state. *Price v. State*, 285 Ark. 148, 685 S.W.2d 506 (1985).

Operation or Control of Vehicle.

Defendant held to be in control of vehicle. *Walker v. State*, 241 Ark. 396, 408 S.W.2d 474 (1966) (decision under prior law); *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985); *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985); *Altes v. State*,

286 Ark. 94, 689 S.W.2d 541 (1985); *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985); *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988).

The defendant held not to be in actual control of his vehicle. *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984) (decision under prior law).

There are three ways to prove operation of a motor vehicle: (1) observation by the officer; (2) evidence of intent to drive after the moment of arrest; or (3) a confession by the defendant that he was driving. *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985); *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992).

In a prosecution for driving while intoxicated, actual control of a vehicle by the defendant may be proved by circumstantial evidence; the officer need not see the driver operating the car in order to have reasonable cause to believe he was doing so. *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985).

Where there was evidence that immediately after the impact, the defendant was in the driver's seat behind the steering wheel, that evidence alone constituted substantial evidence to support the finding that he was driving seconds before the time of impact. *Tumbs v. State*, 290 Ark. 214, 718 S.W.2d 105 (1986).

Investigatory stop of vehicle held justified. *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987).

Where defendant conceded that he was intoxicated, and the officer testified that defendant was found in the driver's position with the engine actually running, the jury could properly have concluded that he was in actual physical control of a motor vehicle. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

It was error for the court to instruct the jury that it must find against defendant on the issue of control if it found that circumstances existed from which an inference of this element could be drawn. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

To be guilty of DWI, it does not have to be shown that a defendant was driving the vehicle or driving the vehicle in a hazardous or negligent manner; in fact, it only requires a showing that the defendant was in actual physical control of the vehicle while intoxicated. *Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

Where defendant's hands were on the steering wheel of a parked vehicle with the motor running and the lights on, defendant was in actual physical control of a vehicle. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

Evidence held sufficient to establish that defendant was in actual physical control of a motor vehicle where defendant was in the driver's side of a parked car with its engine running; the evidence was sufficient to permit the fact-finder to infer that the defendant had driven the car shortly before her arrest. *Beckner v. State*, 49 Ark. App. 56, 896 S.W.2d 445 (1995).

Evidence that defendant either operated or was in actual physical control of a vehicle held sufficient where defendant was discovered by police walking away from a one-vehicle accident involving his own truck for which he possessed the keys in his pocket, and there was testimony that defendant had been driving his truck not long before his encounter with the police. *Springston v. State*, 61 Ark. App. 36, 962 S.W.2d 836 (1998).

Defendant was in actual physical control of a vehicle where an officer found the defendant on the driver's side of the running vehicle and slumped over in the seat apparently unconscious, notwithstanding the defendant's assertion that he had a designated driver and went out to warm up the vehicle because it was cold. *Diehl v. State*, 63 Ark. App. 190, 975 S.W.2d 878 (1998).

A defendant was not in actual physical control of a vehicle where an officer found the defendant asleep, intoxicated, and sitting behind the steering wheel, with the driver's side window rolled down, the motor and the car lights off, and the keys to the vehicle on the dashboard. *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000).

Place of Operation.

One may be convicted of DWI while operating a vehicle on a private roadway. *Sanders v. State*, 312 Ark. 11, 846 S.W.2d 651 (1993).

This section contains no location or geographic element, and one cannot read it to add as an element of DWI that the accused have operated or had control of a vehicle on a public highway. *Sanders v. State*, 312 Ark. 11, 846 S.W.2d 651 (1993).

The offense of DWI can be committed on

the parking lot of a private club. *Hill v. State*, 315 Ark. 297, 868 S.W.2d 44 (1993).

Portable Breath Test.

Evidence of the results of a portable breath test are not admissible as substantive evidence absent proof of their reliability; therefore, the trial court did not err in refusing to allow defendant to admit the results into evidence in a driving while intoxicated case. *Elser v. State*, 353 Ark. 143, 114 S.W.3d 168 (2003).

Although defendant was acquitted of refusal to consent to a breath test in the municipal court, where he appealed his conviction for driving while intoxicated (DWI) to the circuit court, the refusal was admissible as evidence showing knowledge or consciousness of guilt. *Etheredge v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 107 (Feb. 9, 2005).

Prohibited Conduct.

Under subsection (b), intoxication is not an element of the offense; driving with a blood alcohol content of .10% or more is the prohibited act; stated differently, it is a violation per se to drive with a blood alcohol content of .10% or more. *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984).

Right to Counsel.

Because trial court had discretion in sentencing defendant to jail for first offense DWI, he was not accused or convicted of a "serious crime," and his right to counsel did not attach at the trial level. *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990).

First offense DWI is not a serious crime by which failure to perfect an appeal would permit a claim of ineffective assistance of counsel to prevail, and failure of defendant's counsel to perfect his appeal is not a denial of his right to effective assistance of counsel. *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990).

Separate Offenses.

The two subsections of this section do not state two separate offenses that require different elements of proof; the penalty is the same whether the section is violated by conduct proscribed by either subsection, and thus the two conditions are simply two different ways of proving a single violation. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

If the state proceeded against defendant first on driving while intoxicated (DWI) and he were acquitted, the state would be collaterally estopped from proceeding against him in a second trial for negligent homicide; however, the same result does not apply when the two offenses are tried simultaneously. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Defendant's manner of driving, which included speeding and driving left of center, violated city's hazardous driving ordinance, while defendant's act of driving his vehicle while being intoxicated violated this section; it is clear that these offenses are two separate offenses for the purpose of double jeopardy analysis since each statutory provision requires proof of a fact which the other does not. *Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

Cited: *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984); *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984); *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985); *Hegler v. State*, 286 Ark. 215, 691

S.W.2d 129 (1985); *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985); *Van Patten v. State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985); *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985); *Hoover v. Thompson*, 787 F.2d 449 (8th Cir. 1986); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987); *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52 (1988); *See v. State*, 296 Ark. 498, 757 S.W.2d 947 (1988); *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988); *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990); *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *Smith v. State*, 55 Ark. App. 97, 931 S.W.2d 792 (1996); *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996); *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996); *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (1996); *Wright v. State*, 327 Ark. 558, 940 S.W.2d 432 (1997); *State v. Aud*, 351 Ark. 531, 95 S.W.3d 786 (2003).

5-65-104. Seizure, suspension, and revocation of license — Temporary permits — Ignition interlock restricted license.

(a)(1) At the time of arrest for operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood, as provided in § 5-65-103, the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer as provided in § 5-65-402.

(2) The Office of Driver Services or its designated official shall suspend or revoke the driving privilege of an arrested person or shall suspend any nonresident driving privilege of an arrested person, as provided in § 5-65-402. The suspension or revocation shall be based on the number of previous offenses as follows:

(A) Suspension for:

(i) One hundred twenty (120) days for the first offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of at least eight hundredths (0.08) but less than fifteen hundredths (0.15) by weight of alcohol in the person's blood or breath, § 5-65-103;

(ii) Suspension for six (6) months for the first offense of operating or being in actual physical control of a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance; and

(iii)(a) Suspension for one hundred eighty (180) days for the first offense of operating or being in actual physical control of a motor

vehicle while intoxicated and while there was an alcohol concentration of fifteen hundredths (0.15) or more by weight of alcohol in the person's blood or breath.

(b) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the ignition interlock restricted license shall be available immediately.

(c) The restricted driving permit provision of § 5-65-120 does not apply to this suspension;

(B)(i) Suspension for twenty-four (24) months for a second offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the suspension period for which no restricted license is available is a minimum of one (1) year;

(C)(i) Suspension for thirty (30) months for the third offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the suspension period for which no restricted license is available is a minimum of one (1) year; and

(D) Revocation for four (4) years, during which no restricted permits may be issued, for the fourth or subsequent offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(3) If a person is a resident who is convicted of driving without a license or permit to operate a motor vehicle and the underlying basis for the suspension, revocation, or restriction of the license was for a violation of § 5-65-103, in addition to any other penalties provided for under law, the office may restrict the offender to only an ignition interlock restricted license for a period of one (1) year prior to the reinstatement or reissuance of a license or permit after the person would otherwise be eligible for reinstatement or reissuance of the person's license.

(4) In order to determine the number of previous offenses to consider when suspending or revoking the arrested person's driving privileges, the office shall consider as a previous offense:

(A) Any conviction for an offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood under § 5-65-103 or refusing to submit to a chemical test under § 5-65-202 that occurred prior to July 1, 1996; and

(B) Any suspension or revocation of driving privileges for an arrest for operating or being in actual physical control of a motor vehicle while intoxicated or while there is an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood under § 5-65-103 or refusing to submit to a chemical test under § 5-65-202 occurring on or after July 1, 1996, when the person was not subsequently acquitted of the criminal charges.

(b)(1)(A) Any person whose license is suspended or revoked pursuant to this section is required to complete an alcohol education program or an alcohol treatment program as approved by the Bureau of Alcohol and Drug Abuse Prevention of the Division of Health of the Department of Health and Human Services unless the charges are dismissed or the person is acquitted of the charges upon which the suspension or revocation is based.

(B) If during the period of suspension or revocation under subdivision (b)(1)(A) of this section the person commits an additional violation of § 5-65-103, he or she is also required to complete an approved alcohol education program or alcohol treatment program for each additional violation, unless:

(i) The additional charges are dismissed; or

(ii) He or she is acquitted of the additional charges.

(2) A person whose license is suspended or revoked pursuant to this section shall furnish proof of attendance at and completion of the alcohol education program or the alcohol treatment program required under subdivision (b)(1) of this section before reinstatement of his or her suspended or revoked driver's license or shall furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(3) Even if a person has filed a de novo petition for review pursuant to former subsection (c) of this section, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

History. Acts 1983, No. 549, § 13; 1985, No. 113, § 1; 1985, No. 1064, § 1; A.S.A. 1947, § 75-2511; Acts 1989, No. 368, § 1; 1989, No. 621, § 1; 1993, No. 736, § 1; 1995, No. 802, § 1; 1997, No. 830, § 1; 1997, No. 1325, § 2; 1999, No. 1077, § 9; 1999, No. 1468, § 1; 1999, No. 1508, § 7; 2001, No. 561, §§ 3-5; No. 1501, § 1; 2003, No. 541, § 1; 2003, No. 1036, § 1; 2003, No. 1462, § 1; 2003, No. 1779, § 1; 2005, No. 1234, § 3; 2005, No. 1768, § 1.

A.C.R.C. Notes. Acts 1995, No. 802, § 5, provided, in part: "(a) Sections 1, 3, and 4 of this act shall be effective for all arrests or offenses occurring on or after July 1, 1996."

The amendment of this section by Acts 1999, No. 1077, was deemed pursuant to § 1-2-207 to be superseded by its amendment by Acts 1999, Nos. 1468 and 1508. Acts 1999, No. 1077, § 9, amended this section to read as follows:

"(a) The Office of Driver Services of the Revenue Division of the Department of Finance and Administration or its designated official shall suspend or revoke the driving privilege of an arrested person or shall suspend any nonresident driving privilege of an arrested person in the manner provided in § 5-65-402 as follows:

"(1)(A) Suspension for one hundred twenty (120) days for the first offense of a violation of § 5-65-103;

“(B) Suspension for six (6) months for the first offense of operating or being in actual physical control of a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance;

“(2) Suspension for sixteen (16) months, during which no restricted permits may be issued, for a second offense of a violation of § 5-65-103 within five (5) years of the first offense;

“(3) Suspension for thirty (30) months, during which no restricted permits may be issued, for the third offense of a violation of § 5-65-103 within five (5) years of the first offense;

“(4) Revocation for four (4) years, during which no restricted permits may be issued, for the fourth or subsequent offense of a violation of § 5-65-103 within a five-year period of the first offense;

“(5) If the person is a resident without a license or permit to operate a motor vehicle in this state, the Office of Driver Services shall, in addition to any other penalties provided for in this act, deny to that person the issuance of a license or permit for a period of six (6) months for a first offense. For a second or subsequent offense by a resident without a license or permit to operate a motor vehicle, the Office of Driver Services shall, in addition to any other penalties provided for in this act, deny to that person the issuance of a license or permit for a period of one (1) year.

“(6)(A) If the person is a nonresident, such person's privilege to operate a motor vehicle in Arkansas shall be suspended in the same manner as that of a resident. The Office of Driver Services shall notify the office that issued the nonresident's motor vehicle license of the action taken by the Office of Driver Services.

“(B) When the person is a nonresident without a license or permit to operate a motor vehicle, the Office of Driver Services shall notify the office of issuance for that person's state of residence of action taken by the Office of Driver Services.

“(b) In order to determine the number of previous offenses to consider when suspending or revoking the arrested person's driving privileges, the Office of Driver Services shall consider as a previous offense:

“(1) Any convictions for offenses of operating or being in actual physical control of a motor vehicle while intoxicated or while

there is one-tenth of one percent (0.1%) or more by weight of alcohol in the person's blood under § 5-65-103 or refusing to submit to a chemical test under § 5-65-202 which occurred prior to July 1, 1996; and

“(2) Any suspension or revocation of driving privileges for arrests for operating or being in actual physical control of a motor vehicle while intoxicated or while there is one-tenth of one percent (0.1%) or more by weight of alcohol in the person's blood under § 5-65-103 or refusing to submit to a chemical test under § 5-65-202 occurring on or after July 1, 1996, where the person was subsequently convicted of the criminal charges.

“(c) For all arrests or offenses occurring before the effective date of this act, but which have not reached a final disposition as to judgment in court, the offenses shall be decided under the law in effect at the time the offense occurred, and any defendant shall be subject to the penalty provisions in effect at that time and not under the provisions of this section.”

Publisher's Notes. Acts 1995, No. 802, § 5(a), is also codified, in part, as §§ 5-65-120(c) and 5-65-205(c).

Amendments. The 2001 amendment by No. 561 rewrote (a)(1), (a)(4), (a)(8), and (a)(9) and made minor stylistic changes.

The 2001 amendment by No. 1501 rewrote this section.

The 2003 amendment by No. 541 added (a)(9)(C) and made related changes.

The 2003 amendment by No. 1036 rewrote this section.

The 2003 amendment by No. 1462 redesignated former (h)(1) as present (b)(1) and deleted the former last three sentences.

The 2003 amendment by No. 1779 substituted “the interlock restrict license shall be available immediately” for “the suspension period for which no restricted license shall be available shall be a minimum of thirty (30) days” in present (a)(2)(A)(iii).

The 2005 amendment by No. 1234 substituted “if the office” for “if the court orders” in (a)(2)(A)(iii), (a)(2)(B) and (a)(2)(C); and, in (a)(3), substituted “the office” for “the court may order” and “may restrict the offender to” for “that the Office of Driver Services may issue.”

The 2005 amendment by No. 1768 redesignated former (b)(1) as present

(b)(1)(A); in present (b)(1)(A), deleted “as prescribed and approved by the Highway Safety Program” following “education program” and substituted “Human Services” for “Health”; added (b)(1)(B); and inserted “or programs required under subdivision (b)(1) of this section” in (b)(2).

Cross References. Effect of administrative revocation on motor vehicle insurance, § 27-22-106.

Administrative driver’s license suspension, § 5-65-410 et seq.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Driving While Intoxicated, 26 UALR L.J. 367.

CASE NOTES

ANALYSIS

Constitutionality.

In general.

Construction.

Burden of proof.

Jurisdiction.

Notice.

Purpose.

Prior convictions.

Sentence.

Temporary permit.

Constitutionality.

Sections 5-65-107, 5-65-109, and this section do not violate the doctrines of prosecutorial discretion and separation of powers. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985) (decision prior to 1989 amendment).

This section does not violate the constitutional prohibition on double jeopardy; this section does not impose multiple punishments for the same offense. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

Administrative suspension of a license for 180 days did not rise to the level of punishment because the suspension was that of a privilege, not a right, to operate a motor vehicle; and the Double Jeopardy Clause was not violated by a subsequent conviction on criminal charges. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

The temporary revocation of the privilege of driving for refusal to submit to a chemical analysis is rationally related to the purpose of this section, which is to protect the public from intoxicated drivers and to reduce alcohol-related accidents. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

In General.

This section does not take the power of license suspension from the jury; rather, it only directs the court to perform certain acts in executing the sentence. *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Construction.

Although defendant was charged with DWI second offense but convicted instead of DWI first offense, the defendant was not acquitted of the “charge” of DWI second offense; once the municipal court convicted defendant of DWI first offense, he simply had two separate convictions of violating § 5-65-103, since DWI first offense is just as much a violation of § 5-65-103 as is DWI second offense. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

Burden of Proof.

The standard for administrative license suspension established by subdivision (a)(8) is based on the civil standard of proof by a preponderance of the evidence, a lower standard than that required for a criminal conviction. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

Jurisdiction.

The court had authority to suspend the driver’s license of defendant convicted of driving while intoxicated and speeding, notwithstanding the contention that only the Department of Finance and Administration can suspend a license for driving while intoxicated, since the court still had authority, pursuant to § 27-5-306, to suspend the defendant’s driver’s license for

moving traffic violations. *Cook v. State*, 333 Ark. 22, 968 S.W.2d 589 (1998).

Notice.

The service provisions of ARCP 4 apply to this section's de novo review proceedings because this section is silent on notice or service of process at the circuit court level. *Weiss v. Johnson*, 331 Ark. 409, 961 S.W.2d 28 (1998).

Purpose.

The purpose for the sanctions is to prevent drunk driving, and it is clear that the legislative intent was to provide remedial civil sanctions. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

The legislature intended to establish a remedial civil sanction for the purpose of protecting the public from intoxicated drivers and to reduce alcohol-related accidents while softening the sanctions in order to allow the person to continue to operate a vehicle for appropriate purposes. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

Prior Convictions.

Trial court properly granted defendant's pretrial motion to suppress evidence of his three prior driving while intoxicated convictions because in those earlier proceedings he was not represented by counsel. *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984).

The legislative intent of the Omnibus DWI Act of 1983, as stated in § 5-65-101(b), was to enhance penalties by using convictions under the older driving while under the influence act; thus, previous convictions for driving while under the influence under the prior law of intoxicants may be used as prior offenses for enhancement purposes. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Where certificates of prior convictions did not reflect that the defendants were represented by counsel at prior trials, admission of the documents held to be error. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

A prior conviction cannot be used collaterally to impose enhanced punishment, unless the misdemeanor was represented by counsel or validly waived counsel. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985).

If the record of one of three prior driving

while intoxicated convictions is silent as to representation or waiver of counsel, the conviction cannot be used as evidence that the offense charged is a second or subsequent DWI offense. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Evidence that the defendant was assisted by counsel at the trial of his prior DWI conviction was held insufficient, and therefore, because there was not sufficient evidence of representation, the defendant's third conviction could not be used as evidence that the present conviction was his fourth. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Two separate convictions of DWI first offense, both violations of § 5-65-103, should be counted as two "previous offenses." *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

Sentence.

The sentencing provisions of the Omnibus DWI Act of 1983 are mandatory; where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984).

The legislature enacted § 5-65-102 to allow those with no alternate means of commuting to and from work to apply for a restricted driving permit; this section rebuts any argument concerning the punitive effect of the sanction upon a person whose license has been suspended, as a result of which his ability to maintain his means of livelihood is impaired. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997).

Second-offense sanctions could be imposed on defendant with two convictions for DWI first offense. *Leathers v. Cotton*, 332 Ark. 49, 961 S.W.2d 32 (1998).

Temporary Permit.

This section clearly provides for a temporary permit to be issued upon arrest, which remains valid until the trial, but, after a guilty plea or conviction of a first offender, the temporary permit does not continue indefinitely until the first offender receives notice of the right to apply for a restricted license. *Liggett v. State*, 309 Ark. 608, 832 S.W.2d 813 (1992).

Cited: *Rawlings v. State*, 284 Ark. 446, 683 S.W.2d 223 (1985); *Urich v. State*, 293 Ark. 246, 737 S.W.2d 155 (1987); *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991).

5-65-105. Operation of motor vehicle during period of license suspension or revocation.

Any person whose privilege to operate a motor vehicle has been suspended or revoked under a provision of this act who operates a motor vehicle in this state during the period of the suspension or revocation shall be imprisoned for ten (10) days and may be assessed a fine of not more than one thousand dollars (\$1,000).

History. Acts 1983, No. 549, § 14; A.S.A. 1947, § 75-2512; Acts 2001, No. 1715, § 1.

Amendments. The 2001 amendment added “may be assessed ... one thousand

dollars (\$1,000)” and made minor stylistic changes.

Meaning of “this act”. See note to § 5-65-101.

CASE NOTES

Sentencing.

The sentencing provisions of the Omnibus DWI Act of 1983 are mandatory; where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984).

Cited: *Liggett v. State*, 309 Ark. 608, 832 S.W.2d 813 (1992); *Brown v. State*, 38 Ark. App. 18, 827 S.W.2d 174 (1992); *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

5-65-106. Impoundment of license plate.

(a) When any law enforcement officer arrests a person for operating a motor vehicle while that person’s operator’s license or permit has been suspended or revoked under the laws of any state due to the person having previously been found guilty or having pleaded guilty or nolo contendere to violating § 5-65-103, and if the motor vehicle operated by the person is owned in whole or part by the person, the motor vehicle license plate shall be impounded by the law enforcement officer for no less than ninety (90) days.

(b) If the court determines it is in the best interest of dependents of the offender, the court shall instruct the Director of the Department of Finance and Administration to issue a temporary substitute license plate to that vehicle, and the license plate shall indicate that the original plate has been impounded.

History. Acts 1983, No. 549, § 15; A.S.A. 1947, § 75-2513.

5-65-107. Persons arrested to be tried on charges — No charges reduced — Filing citations.

(a) A person arrested for violating § 5-65-103 shall be tried on those charges or plead to those charges, and no such charges shall be reduced.

(b) Furthermore, when a law enforcement officer issues a citation for violating § 5-65-103, the citation shall be filed with the court as soon as possible.

History. Acts 1983, No. 549, § 8;
A.S.A. 1947, § 75-2508.

CASE NOTES

ANALYSIS

Constitutionality.
Altering charges.
Citation.
Reduction of offense.

Constitutionality.

That part of the Omnibus DWI Act which takes away from the prosecuting attorney and the court the right to reduce a charge and accept plea bargains and places that power within the hands of the policeman who files the charge is not unconstitutional. *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

The doctrine of prosecutorial discretion and separation of powers are not violated by this section. *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985).

This section and §§ 5-65-104 and 5-65-108 do not violate the doctrines of prosecutorial discretion and separation of powers. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

It is not unconstitutional for this section to authorize a police officer, rather than the prosecuting attorney or grand jury, to file the misdemeanor charge. *Bigham v. State*, 23 Ark. App. 108, 743 S.W.2d 405 (1988).

Altering Charges.

Municipal court erred and prejudiced

defendant charged with driving while intoxicated (DWI) when it changed the charge to driving under the influence (DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated this section; and the circuit court erred in trying and convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under § 16-19-1105. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997).

Citation.

Where citation issued by police officer was sufficient to charge defendant with the violation, a subsequent attempt by the city attorney to duplicate that charge could not destroy the citation's effectiveness. *Bigham v. State*, 23 Ark. App. 108, 743 S.W.2d 405 (1988).

Reduction of Offense.

The no-reduction language of this section applies to the reduction of the offense, such as to reckless driving, not to the number of offenses. *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984).

Cited: *Brewer v. State*, 286 Ark. 1, 688 S.W.2d 736 (1985); *Pipes v. State*, 22 Ark. App. 235, 738 S.W.2d 423 (1987); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

5-65-108. No probation prior to adjudication of guilt.

(a) Section 16-93-301 et seq., allows a circuit court judge, district court judge, or city court judge to place on probation a first offender who pleads guilty or nolo contendere prior to an adjudication of guilt.

(b) Upon successful completion of the probation terms, the circuit court judge, district court judge, or city court judge is allowed to discharge the accused without a court adjudication of guilt and expunge the record.

(c)(1) After March 21, 1983, no circuit court judge, district court judge, or city court judge may utilize the provisions of § 16-93-301 et seq. in an instance in which the defendant is charged with violating § 5-65-103.

(2) Notwithstanding the provisions of § 5-4-301, § 5-4-322, or subdivision (c)(1) of this section, in addition to the mandatory penalties required for a violation of § 5-65-103, a circuit court judge, district court judge, or city court judge may utilize probationary supervision

solely for the purpose of monitoring compliance with his or her orders and require an offender to pay a reasonable fee in an amount to be established by the circuit court judge, district court judge, or city court judge.

History. Acts 1983, No. 549, § 9; A.S.A. 1947, § 75-2509; Acts 2005, No. 1768, § 2.

Amendments. The 2005 amendment substituted “circuit courts, district courts, and city courts” for “circuit and municipal

courts” in (a); redesignated former (c) as present (c)(1); added (c)(2); and substituted “circuit judge, district judge, or city judge” for “circuit judge or municipal judge” in (c)(1).

CASE NOTES

ANALYSIS

Constitutionality.
Mandatory sentencing.

Constitutionality.

This section, §§ 5-65-104 and 5-65-107 do not violate the doctrines of prosecutorial discretion and separation of powers. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

Mandatory Sentencing.

The trial court was without authority to suspend the sentence of a defendant convicted of driving while intoxicated or put him on probation so he would not have to attend an alcohol treatment or education program. *Harris v. State*, 285 Ark. 345, 686 S.W.2d 440 (1985).

Cited: *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984).

5-65-109. Presentencing report.

(a) The court shall immediately request and the Highway Safety Program or its designee shall provide a presentence screening and assessment report of the defendant upon a plea of guilty or nolo contendere to or a finding of guilt of violating § 5-65-103.

(b)(1) The presentence report shall be provided within thirty (30) days of the request, and the court shall not pronounce sentence until receipt of the presentence report.

(2)(A) After entry of a plea of guilty or nolo contendere or a finding of guilt and if the sentencing of the defendant is delayed by the defendant, the clerk shall notify the defendant by first class mail sent to the defendant’s last known address that the defendant has fifteen (15) days to appear and show cause for failing to appear for sentencing.

(B) After expiration of the fifteen (15) days, the court may proceed with sentencing even in the absence of the defendant.

(c) The report shall include, but not be limited to, the defendant’s driving record, an alcohol problem assessment, and a victim impact statement when applicable.

History. Acts 1983, No. 549, § 6; A.S.A. 1947, § 75-2506; Acts 1991, No. 899, § 1; 1999, No. 1077, § 10; 2003, No. 129, § 1.

Amendments. The 2003 amendment, in (a), inserted “violating § 5-65-103” fol-

lowing “nolo contendere to” and made stylistic changes; redesignated former (b) as present (b)(1); added present (b)(2); and substituted “defendant’s” for “offender’s” in (c).

CASE NOTES

ANALYSIS

Self-incrimination.

Sentencing.

Self-Incrimination.

This section does not require a defendant to take any action whatever in response to the state's proof or to the presentence report; so there is no compulsory self-incrimination. *Janes v. State*, 285 Ark. 279, 686 S.W.2d 783 (1985); *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

The presentence screening and assessment report on the defendant required by this section do not violate his right against compulsory self-incrimination. *Johnston v. City of Fort Smith*, 15 Ark. App. 102, 690 S.W.2d 358 (1985).

The mere possibility that defendant may be asked questions, the answers to which may have the effect of causing the trial court to sentence more harshly than it otherwise might, did not excuse defendant's violation of the trial court's order that he report to the agency charged with the responsibility of conducting an evaluation. *Watson v. City of Fayetteville*, 322 Ark. 324, 909 S.W.2d 637 (1995).

Sentencing.

The requirement that the jury fix the

sentence does not render the presentence report requirement of this section meaningless; there are situations when the report still will be of value, as when the court fixes the sentence under one of the exceptions of § 5-4-103(b). *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Subsection (b) does not require that sentencing be delayed 30 days after a finding of guilt. *Lowe v. State*, 300 Ark. 106, 776 S.W.2d 822 (1989).

The trial court committed reversible error in imposing sentence in the absence of a presentence report where (1) the defendant was convicted of driving while intoxicated, (2) after the jury deadlocked in the sentencing phase, the trial court assumed the sentencing function, and (3) the defendant was given the maximum sentence of a year in jail, a \$ 1,000 fine, and suspension of his driver's license for 120 days. *Donald v. State*, 73 Ark. App. 79, 42 S.W.3d 563 (2001).

Cited: *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984); *Rawlings v. State*, 284 Ark. 446, 683 S.W.2d 223 (1985); *Price v. State*, 285 Ark. 148, 685 S.W.2d 506 (1985); *Hogan v. State*, 289 Ark. 402, 712 S.W.2d 295 (1986); *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992).

5-65-110. Record of violations and court actions — Abstract.

(a) Any magistrate or judge of a court shall keep or cause to be kept a record of any violation of this act presented to that court and shall keep a record of any official action by that court in reference to the violation including, but not limited to, a record of every finding of guilt, plea of guilty or nolo contendere, judgment of acquittal, and the amount of fine and jail sentence.

(b) Within thirty (30) days after sentencing a person who has been found guilty or pleaded guilty or nolo contendere on a charge of violating any provision of this act, the magistrate of the court or clerk of the court shall prepare and immediately forward to the Office of Driver Services an abstract of the record of the court covering the case in which the person was found guilty or pleaded guilty or nolo contendere, and the abstract shall be certified by the person so required to prepare it to be true and correct.

(c) The abstract shall be made upon a form furnished by the office and shall include:

(1) The name and address of the party charged;

- (2) The number, if any, of the operator's or chauffeur's license of the party charged;
- (3) The registration number of the vehicle involved;
- (4) The date of hearing;
- (5) The plea;
- (6) The judgment; and
- (7) The amount of the fine and jail sentence, as the case may be.

History. Acts 1983, No. 549, § 10;
A.S.A. 1947, § 75-2510.

Meaning of "this act". See note to
§ 5-65-101.

CASE NOTES

Admissibility.

Where the first two documents of an exhibit were certified by the Deputy Clerk of the Municipal Court and filed with the Department of Finance and Administration as required by subsection (b) of this section, and the documents were duly certified as true and correct copies of the

records of the Office of Driver Control by the Manager of the Driver Control Section, the exhibit was admissible as a self-authenticating document pursuant to Evid. Rule 902(4). *Price v. State*, 48 Ark. App. 37, 889 S.W.2d 40 (1994).

Cited: *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984).

5-65-111. Prison terms — Exception.

(a)(1)(A) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103, for a first offense, may be imprisoned for no less than twenty-four (24) hours and no more than one (1) year.

(B) However, the court may order public service in lieu of jail, and in that instance, the court shall include the reasons for the order of public service in lieu of jail in the court's written order or judgment.

(2)(A) However, if a passenger under sixteen (16) years of age was in the vehicle at the time of the offense, a person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103, for a first offense, may be imprisoned for no fewer than seven (7) days and no more than one (1) year.

(B) However, the court may order public service in lieu of jail, and in that instance, the court shall include the reasons for the order of public service in lieu of jail in the court's written order or judgment.

(b) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 or any other equivalent penal law of another state or foreign jurisdiction shall be imprisoned or shall be ordered to perform public service in lieu of jail as follows:

(1)(A) For no fewer than seven (7) days but no more than one (1) year for the second offense occurring within five (5) years of the first offense or no fewer than thirty (30) days of community service.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for no fewer than thirty (30) days but no more than one (1) year for the second offense occurring within five (5) years of the first offense or no fewer than sixty (60) days of community service.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service;

(2)(A) For no fewer than ninety (90) days but no more than one (1) year for the third offense occurring within five (5) years of the first offense or no fewer than ninety (90) days of community service.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for no fewer than one hundred twenty days (120) days but no more than one (1) year for the third offense occurring within five (5) years of the first offense or no fewer than one hundred twenty (120) days of community service.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service;

(3)(A) For at least one (1) year but no more than six (6) years for the fourth offense occurring within five (5) years of the first offense or not less than one (1) year of community service and is guilty of a felony.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for at least two (2) years but no more than six (6) years for the fourth offense occurring within five (5) years of the first offense or not less than two (2) years of community service and is guilty of a felony.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service; and

(4)(A)(i) For at least two (2) years but no more than ten (10) years for the fifth or subsequent offense occurring within five (5) years of the first offense or not less than two (2) years of community service and is guilty of a felony.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for at least three (3) years but no more than ten (10) years for the fifth offense occurring within five (5) years of the first offense or not less than three (3) years of community service and is guilty of a felony.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service.

(c) For any arrest or offense occurring before July 30, 1999, but that has not reached a final disposition as to judgment in court, the offense shall be decided under the law in effect at the time the offense occurred, and any defendant is subject to the penalty provisions in effect at that time and not under the provisions of this section.

(d) It is an affirmative defense to prosecution under subdivisions (a)(2), (b)(1)(B), (b)(2)(B), (b)(3)(B), and (b)(4)(B) of this section that the person operating or in actual physical control of the motor vehicle was not more than two (2) years older than the passenger.

History. Acts 1983, No. 549, § 4; A.S.A. 1947, § 75-2504; Acts 1997, No. 1236, § 1; 1999, No. 1077, § 11; 2001, No. 1206, § 1; 2003, No. 1461, §§ 1, 2.

Amendments. The 2001 amendment substituted “but no more than” for “and no more than” in (b)(1) and (b)(2); deleted “or subsequent” preceding “offense occurring”

in (b)(3); and added (b)(4) and made related changes.

The 2003 amendment added (a)(2), (b)(1)(B), (b)(2)(B), (b)(3)(B), (b)(4)(A)(ii), (b)(4)(B) and (d); added “service and shall be guilty of a felony,” at the end of (a)(4)(A)(i); and made stylistic and related changes.

RESEARCH REFERENCES

Ark. L. Rev. Notes, *Shockley v. State: The Constitutionality of the Arkansas Habitual Offender Determination Procedure*, 39 Ark. L. Rev. 553.

UALR L.J. *Survey — Criminal Law*, 11 UALR L.J. 175.

Seventeenth Annual Survey of Arkansas Law — Criminal Law, 17 UALR L.J. 448.

Survey of Legislation, 2001 Arkansas General Assembly, *Criminal Law*, 24 UALR L.J. 429.

Survey of Legislation, 2003 Arkansas General Assembly, *Criminal Law, Driving While Intoxicated*, 26 UALR L.J. 367.

CASE NOTES

ANALYSIS

- Constitutionality.
- Construction.
- Applicability of other provisions.
- Arrest.
- Assistance of counsel.
- Bifurcation of trial.
- First offense.
- Indictment or information.
- Prior convictions.
- Sentencing.

Constitutionality.

The application of subsection (b)(3) to the defendant did not violate the prohibition against ex post facto laws, notwithstanding that the pre-1999 version of the statute only allowed the state to rely on prior DWI convictions from the last three, rather than five, years; the application of subsection (b)(3) did not improperly allow the state to consider prior convictions that were more than three years old, as the defendant had notice, by the amendment of the statute, that any future offense would subject him to increased penalties based on convictions in the previous five years. *Berry v. State*, 74 Ark. App. 141, 45 S.W.3d 435 (2001).

Construction.

The language of this section is unambiguous: the element of fourth-offense DWI is based on the number of prior offenses, not

how they were designated. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

Applicability of Other Provisions.

Section 5-4-502 is inapplicable to the Omnibus DWI Act because it applies only to the determination of habitual offender status pursuant to § 5-4-501; that statute provides extended terms of imprisonment for those who have committed more than one but less than four felonies. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Defendant’s sentence was not authorized under § 5-65-111(b)(4) because the trial court should not have used the habitual offender statute, § 5-4-501, in conjunction with the DWI sentencing enhancement provision; therefore, his sentence was properly modified from 15 to 10 years’ imprisonment. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Arrest.

A private person cannot make an arrest for second offense driving while intoxicated. *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990).

Assistance of Counsel.

If the record is silent as to representation of the defendant or waiver of the right to counsel, the conviction cannot be used as evidence that the offense charged is the

fourth driving while intoxicated offense, and thus a felony under this section. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Where the state introduced into evidence duly certified copies of documents purporting to evidence three prior convictions for the offense of driving while intoxicated and two of the documents contained the entry "Trial Docket," and immediately beneath appeared the name of an attorney, and clerk of the court in which the convictions were obtained testified as to the manner in which such docket entries were made and that appearance of attorney's name meant that he had represented defendant and that, had defendant not been represented by an attorney, the word "none" would have appeared on the docket where attorney's name was shown, record entry was not too ambiguous to establish representation by counsel. *Rodgers v. State*, 31 Ark. App. 159, 790 S.W.2d 911 (1990).

Certified copies of court dockets introduced to prove defendant's prior convictions of DWI, on which there was a column designated "Atty.:" and immediately after this designation on the first docket sheet appeared names, under *Tims v. State*, 26 Ark. App. 102, 760 S.W.2d (1988), *supp. op. on reh'g granted*, 26 Ark. App. 106-A, 770 S.W.2d 211 (1989), because the entries could mean that the attorneys were either defense counsel or the prosecutor, in the absence of further evidence, the record was too ambiguous to determine whether defendant was represented or had validly waived counsel; therefore, defendant's conviction was reversed. *Neville v. State*, 41 Ark. App. 65, 848 S.W.2d 947 (1993).

Bifurcation of Trial.

A trial for driving while intoxicated as a fourth offense should be bifurcated. The jury must first hear evidence of guilt or innocence; if the defendant is found guilty of the instance of DWI alleged, the jury will then hear evidence of previous convictions. The trial judge will still determine whether the accused was represented by, or entered a valid waiver of, counsel in the previous convictions alleged and will exclude evidence of any conviction not meeting the counsel requirement. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

First Offense.

Driving While Intoxicated (DWI), First Offense is a lesser included offense of DWI, Second Offense. *Hagar v. City of Fort Smith*, 317 Ark. 209, 877 S.W.2d 908 (1994).

Indictment or Information.

Information alleging that defendant had three prior DWI "arrests" rather than three prior DWI "convictions" held sufficient where evidence showed that defendant did in fact have three DWI convictions. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

Prior Convictions.

Trial court properly granted defendant's pretrial motion to suppress evidence of his prior driving while intoxicated convictions, because in those earlier proceedings he was not represented by counsel. *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984).

The legislative intent of the Omnibus DWI Act of 1983, as stated in § 5-65-101, was to enhance penalties by using convictions under the prior driving while under the influence act; thus, previous convictions for driving while under the influence of intoxicants under the prior law may be used as prior offenses for enhancement purposes. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

A prior conviction cannot be used collaterally to impose enhanced punishment, unless the misdemeanor was represented by counsel or validly waived counsel. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985); *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985).

Where documents did not reflect that the defendants were represented by counsel at their prior trials, admission of the documents held to be error. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The state is barred from using prior uncounseled misdemeanor convictions for driving while intoxicated to enhance punishment for a subsequent offense. *Steele v. State*, 284 Ark. 340, 681 S.W.2d 354 (1984). But see *Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997).

Evidence held insufficient to meet minimum standards of proof of prior convictions for driving while intoxicated. *Steele*

v. State, 284 Ark. 340, 681 S.W.2d 354 (1984).

If a defendant did not have counsel and did not waive counsel when he was first convicted, that conviction cannot be used for enhancement, and if it is so used the error can be corrected on appeal. *Janex v. State*, 285 Ark. 279, 686 S.W.2d 783 (1985).

If the record of prior driving while intoxicated conviction is silent as to representation or waiver of counsel, the conviction cannot be used as evidence that the offense charged is the fourth DWI offense and thus a felony under this section. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

The existence of three prior convictions constitutes an element of DWI, fourth offense, and thus the trial court deprived the defendant of his right to have the jury determine a material element of the offense charged where after the jury returned a guilty verdict, the judge heard evidence in chambers to determine the number of prior convictions, and then instructed the jury that the range of sentences should be based on three prior convictions. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Evidence that the defendant was assisted by counsel at the trial of previous DWI conviction held insufficient. *Peters v. State*, 286 Ark. 421, 692 S.W.2d 243 (1985).

Where the municipal judge, in his own handwriting, noted that the defendant's rights had been explained and waived in a previous prosecution for driving while intoxicated, the trial court properly considered the prior conviction in setting sentence. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

The General Assembly did not intend to allow a defense attorney to reduce an enhanced penalty for third offense driving while intoxicated to a second offense merely by obtaining continuances so that the last conviction would fall outside the three-year period; similarly, it did not intend that delay due to court congestion might reduce the degree and penalty. Accordingly, the dates the defendant's prior offenses were committed are the determinative dates for determining the applicability of enhanced punishment. *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987).

Where state did not show that all three of the defendant's prior violations occurred within three years of the first violation; but instead, only showed that all three convictions occurred within three years, the case was reversed and remanded. *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987).

Where the record showed that the defendant waived the right to counsel at the time he pleaded guilty to the DWI charge in the municipal court, the record did not have to also show that the judge advised defendant as to the consequences of a subsequent conviction for the same charge before the conviction could be introduced into evidence in the subsequent case. And although the conviction was marked "D.W.I. 2nd Offense," that was not significant where it was, in fact, the defendant's third DWI conviction within three years and defendant knew how many times he had been convicted of that offense. *Dickerson v. State*, 24 Ark. App. 36, 747 S.W.2d 122 (1988).

The offense of driving while intoxicated is less than a felony, unless one is found guilty of a fourth or subsequent offense occurring within three years of the first one. *Credit v. State*, 25 Ark. App. 309, 758 S.W.2d 10 (1988).

The fact of prior convictions is an element of the crime of driving while intoxicated, fourth offense, and is to be determined by the jury. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989).

In the context of a driving while intoxicated (DWI) conviction, the judgment of the district court stands until overturned by a superior court and is a valid DWI offense to be used under subdivision (b)(3) of this section; thus, defendant's judgment of DWI in the district court could be counted as one of four DWI convictions in support of enhanced penalties for multiple DWI offenses. *Swint v. State*, 356 Ark. 361, 152 S.W.3d 226 (2004).

Sentencing.

Where the defendants were convicted of violating the Omnibus DWI Act of 1983, the trial court did not have the authority to suspend their sentences, since the sentencing provisions of the act are mandatory. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

The sentencing provisions of the Omnibus DWI Act of 1983 are mandatory;

where imprisonment is required, such a sentence cannot be reduced or suspended by the judge. *Lovell v. State*, 283 Ark. 425, 681 S.W.2d 395 (1984).

The legislature did not intend that this section, the specific criminal enhancement statute for driving while intoxicated, should be coupled with the general criminal enhancement statute, § 5-4-501, for the resulting purpose of creating a greater sentence than if either statute had been applied singly. *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988).

This statute does not confer upon the trial court authority to instruct the jury on public service as an alternative sentence, rather, the court may order public service in lieu of jail, presumably as part of sentencing following a bench trial, or in the nature of post-conviction relief. *McEntire v. State*, 305 Ark. 470, 808 S.W.2d 762 (1991).

Original judgment and commitment order for driving while intoxicated, fourth offense, was illegal because the two-year imprisonment followed by a five-year term of probation exceeded the maximum penalty for the offense committed as defined under subdivision (b)(3) and because the

imposition of probation following a term of imprisonment is prohibited by § 5-4-104. *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1995).

Critical point for counting driving while intoxicated (DWI) offenses is at the sentencing phase, not the date that the crime is committed, and subdivision (b)(3)(A) plainly contemplates determining total DWI offenses within five years of the first offense and, to the extent Ark. Model Jury Instruction Crim. § 2d 9201.4 is in conflict with this method of counting prior offenses, this section prevails. *State v. Sola*, 354 Ark. 76, 118 S.W.3d 95 (2003).

Cited: *Long v. State*, 284 Ark. 21, 680 S.W.2d 686 (1984); *Municipal Court v. Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987); *Tims v. State*, 26 Ark. App. 102, 770 S.W.2d 211 (1988); *Deweese v. State*, 26 Ark. App. 126, 761 S.W.2d 945 (1988); *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990); *Lukehart v. State*, 32 Ark. App. 152, 798 S.W.2d 117 (1990); *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *State v. Roberts*, 321 Ark. 31, 900 S.W.2d 175 (1995); *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997); *Wray v. State*, 64 Ark. App. 166, 984 S.W.2d 45 (1998).

5-65-112. Fines.

Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 shall be fined:

(1) No less than one hundred fifty dollars (\$150) and no more than one thousand dollars (\$1,000) for the first offense;

(2) No less than four hundred dollars (\$400) and no more than three thousand dollars (\$3,000) for the second offense occurring within five (5) years of the first offense; and

(3) No less than nine hundred dollars (\$900) and no more than five thousand dollars (\$5,000) for the third or subsequent offense occurring within five (5) years of the first offense.

History. Acts 1983, No. 549, § 5; A.S.A. 1947, § 75-2505; Acts 1993, No. 106, § 1; 1999, No. 1077, § 12.

CASE NOTES

ANALYSIS

Applicability.
Prior convictions.

Applicability.

Where the defendants were convicted of

violating the Omnibus DWI Act of 1983, the trial court did not have the authority to suspend their sentences, since the sentencing provisions of the act are mandatory. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Prior Convictions.

Prior convictions may not be considered for purposes of the sentencing enhancement for subsequent convictions for driving while intoxicated unless the record shows the accused had counsel in the trials leading to the prior convictions or that the right to counsel was waived. *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985).

If a defendant did not have counsel and did not waive counsel when he was first

convicted, that conviction cannot be used for enhancement, and if it is so used the error can be corrected on appeal. *Janes v. State*, 285 Ark. 279, 686 S.W.2d 783 (1985).

Cited: *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997).

5-65-113. [Repealed.]

Publisher's Notes. This section, concerning additional court costs, was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No.

13, § 4. The section was derived from Acts 1983, No. 918, §§ 1, 3; A.S.A. 1947, §§ 75-2531, 75-2532.

5-65-114. Inability to pay — Alternative public service work.

If it is determined that any individual against whom fines, fees, or court costs are levied for driving while intoxicated or driving while impaired is financially unable to pay the fines, fees, or costs, the court levying the fines, fees, or costs shall order the individual to perform public service work of such type and for such duration as deemed appropriate by the court.

History. Acts 1983, No. 918, § 4; A.S.A. 1947, § 75-2533.

Cross References. Fines defined, § 12-41-701.

5-65-115. Alcohol treatment or education program — Fee.

(a)(1) Any person whose driving privileges are suspended or revoked for violating § 5-65-103 is required to complete an alcohol education program or an alcoholism treatment program as approved by the Bureau of Alcohol and Drug Abuse Prevention of the Department of Health and Human Services or a program required under § 5-65-104(b)(1), in addition to any other penalty provided by law.

(2)(A) The alcohol education program may collect a program fee of up to one hundred twenty-five dollars (\$125) per enrollee to offset program costs.

(B)(i) A person ordered to complete an alcohol education program or alcoholism treatment program under this section may be required to pay, in addition to the costs collected for education or treatment, a fee of up to twenty-five dollars (\$25.00) to offset the additional costs associated with reporting requirements under this subchapter.

(ii) The alcohol education program shall report semiannually to the bureau all revenue derived from this fee.

(b)(1) A person whose license is suspended or revoked for violating § 5-65-103 shall:

(A) Both:

(i) Furnish proof of attendance at and completion of the alcoholism treatment program or alcohol education program required under § 5-65-104(b)(1) before reinstatement of his or her suspended or revoked driver's license; and

(ii) Pay any fee for reinstatement required under § 5-65-119 or § 5-65-304; or

(B) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(2) An application for reinstatement shall be made to the Office of Driver Services.

(c) Even if a person has filed a de novo petition for review pursuant to § 5-65-402, the person is entitled to reinstatement of driving privileges upon complying with this section and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(d)(1) A person suspended under this act may enroll in an alcohol education program prior to disposition of the offense by the circuit court, district court, or city court.

(2) However, the person is not entitled to any refund of a fee paid if the charges are dismissed or if the person is acquitted of the charges.

(e) Each alcohol education or treatment program shall remit the fees imposed under this section to the bureau.

History. Acts 1983, No. 549, § 7; 1985, No. 108, § 1; A.S.A. 1947, § 75-2507; Acts 1991, No. 486, § 1; 1995, No. 172, § 1; 1995, No. 263, § 1; 1995, No. 1032, § 1; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1999, No. 1077, § 13; 2003, No. 1462, § 2; 2005, No. 1768, § 3.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 1995, Nos. 263 and 1256. Subsection (c) of this section was also amended by Acts 1995, No. 172, § 1, to read as follows:

“(c) Within six (6) months of the final adjudication of guilt, the driver shall furnish proof of attendance at and completion of the alcoholism treatment or education program. If such proof is not furnished, the driver shall be cited for contempt of court and assessed an additional court cost of two hundred dollars (\$200), with fifty dollars (\$50.00) retained by the municipal court. The remaining moneys received from these additional court costs shall be remitted at least quarterly, by January 1, April 1, July 1, and October 1 to the Director of the Department of Finance and Administration. One-half (½) of the moneys so received by the director shall be deposited in the State

Treasury to be credited to the Highway Safety Special Fund for use to support programs of the Arkansas Highway Safety Program. The remaining one-half (½) of such moneys received by the director shall be deposited in the State Treasury to be credited to the Alcohol and Drug Safety Fund to support substance abuse treatment programs of the Bureau of Alcohol and Drug Abuse Prevention of the Department of Health.”

Subsection (c) of this section was also amended by Acts 1995, No. 1032, § 1, to read as follows: “(c) Within six (6) months of the final adjudication of guilt, the driver shall furnish proof of attendance at and completion of the alcoholism treatment or education program. If such proof is not furnished, the driver shall be cited for contempt of court and assessed an additional court cost of two hundred dollars (\$200), with fifty dollars (\$50.00) retained by the municipal court. The remaining moneys received from these additional court costs shall be remitted at least quarterly, by January 1, April 1, July 1, and October 1, to the Director of the Department of Finance and Administration. One-half (½) of the moneys so received by the director shall be deposited in the State

Treasury to be credited to the Highway Safety Special Fund for use to support programs of the Arkansas Highway Safety Program. The remaining one-half (½) of such moneys received by the director shall be deposited in the State Treasury to be credited to the Public Health Fund to support substance abuse treatment programs of the Department of Health, Bureau of Alcohol and Drug Abuse Prevention."

Acts 1993, No. 890, abolished the Division of Alcohol and Drug Abuse Prevention of the Department of Human Services and transferred its powers and duties to the Bureau of Alcohol and Drug Abuse Prevention of the Department of Health.

Amendments. The 2003 amendment substituted "by law" for "in this chapter" in (a)(1); substituted "seventy-five dollars (\$75.00)" for "fifty dollars (\$50.00)" in (a)(2)(A); inserted "education program or alcoholism" and "education or" in

(a)(2)(B); and made minor stylistic changes.

The 2005 amendment, in (a)(1), deleted "as prescribed and approved by the Highway Safety Program" following "education program" and substituted "Human Services or programs required under § 5-65-104(b)(1)" for "Health"; substituted "one hundred twenty-five dollars (\$125)" for "seventy-five dollars (\$75.00)" in (a)(2)(A); substituted "bureau" for "Highway Safety Program" in (a)(2)(B)(ii); inserted "or programs required under § 5-65-104(b)(1)" in (b)(1)(A)(i); substituted "circuit, district, or city court" for "municipal court or circuit court" in (d); and added (e).

Meaning of "this act". Acts 1999, No. 1077, codified as §§ 5-65-104, 5-65-109, 5-65-111, 5-65-112, 5-65-115, 5-65-120, 5-65-205, 5-65-304 — 5-65-307, 5-65-310, 5-65-401 — 5-65-403, 27-16-506, 27-16-903, 27-23-112, 27-23-114, 27-23-115.

Cross References. As to highway safety, see § 27-73-101 et seq.

CASE NOTES

Cited: *Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991); *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996).

5-65-116. Denial of driving privileges for minor — Restricted permit.

(a) As used in this section, "drug offense" means the same as in § 5-64-710.

(b)(1)(A) If a person who is less than eighteen (18) years of age pleads guilty or nolo contendere to or is found guilty of driving while intoxicated under § 5-65-101 et seq., or of any criminal offense involving the illegal possession or use of controlled substances, or of any drug offense, in this state or any other state, or is found by a juvenile court to have committed such an offense, the court having jurisdiction of the matter, including any federal court, shall prepare and transmit to the Department of Finance and Administration an order of denial of driving privileges for the minor.

(B) A court within the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section within twenty-four (24) hours after the plea or finding to the department.

(C) A court outside Arkansas having jurisdiction over any person holding driving privileges issued by the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section pursuant to an agreement or arrangement entered into between that state and the Director of the Department of Finance and Administration.

(D) An arrangement or agreement under subdivision (b)(1)(C) of this section may also provide for the forwarding by the department of an order issued by a court within this state to the state where the person holds driving privileges issued by that state.

(2) For any person holding driving privileges issued by the State of Arkansas, a court within this state in a case of extreme and unusual hardship may provide in an order for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school.

(c) A penalty prescribed in this section or § 27-16-914 is in addition to any other penalty prescribed by law for an offense covered by this section and § 27-16-914.

(d) In regard to any offense involving illegal possession under this section, it is a defense if the controlled substance is the property of an adult who owns the vehicle.

History. Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4; 1993, No. 1257, § 2.

A.C.R.C. Notes. Acts 1993, No. 1257, § 7, provided: "The Director of the Department of Finance and Administration is authorized to enter into any agreements or arrangements with other states and to take all action deemed necessary or

proper, including the making and promulgation of rules and regulations, in order that the amendments contained in this Act may be effectuated."

Publisher's Notes. Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4, are also codified as § 5-64-710.

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12 UALR L.J 617.

CASE NOTES

ANALYSIS

Constitutionality.
Validity.

Constitutionality.

The classification drawn at age eighteen in Acts 1989, No. 93 was reasonable and does not approach the level of irrationality or arbitrariness necessary to deem it un-

constitutional. *Carney v. State*, 305 Ark. 431, 808 S.W.2d 755 (1991).

Validity.

This section was not repealed by implication by § 27-16-915. *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), cert. denied, 507 U.S. 1005, 113 S. Ct. 1647, 123 L. Ed. 2d 268 (1993).

5-65-117. Seizure and sale of motor vehicles.

(a)(1)(A) Any person who pleads guilty or nolo contendere or is found guilty of violating § 5-65-103 for a fourth offense occurring within three (3) years of the first offense, at the discretion of the court, may have his or her motor vehicle seized.

(B) If the motor vehicle is seized, the title to the motor vehicle is forfeited to the state.

(2)(A) If ordered by the court, it is the duty of the sheriff of the county where the offense occurred to seize the motor vehicle.

(B) The court may issue an order directing the sheriff to sell the motor vehicle seized at a public auction to the highest bidder within thirty (30) days from the date of judgment.

(b)(1) The sheriff shall advertise the motor vehicle for sale for a period of two (2) weeks prior to the date of sale by at least one (1) insertion per week in a newspaper having a bona fide circulation in the county.

(2) The notice shall include a brief description of the motor vehicle to be sold and the time, place, and terms of the sale.

(c) The proceeds of the sale of the seized motor vehicle shall be deposited into the county general fund.

(d)(1) After the sheriff has made the sale and has turned over the proceeds of the sale to the county treasurer, the sheriff shall report his or her actions to the court in which the defendant was tried.

(2) The report required by subdivision (d)(1) of this section shall be filed with the court within sixty (60) days from the date of judgment.

(e) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission.

History. Acts 1989 (3rd Ex. Sess.), No. 94, § 1.

5-65-118. Additional penalties — Ignition interlock devices.

(a)(1)(A)(i) In addition to any other penalty authorized for a violation of this chapter, upon an arrest of a person for violating § 5-65-103 for a first or second offense, the Office of Driver Services may restrict the person to operating only a motor vehicle that is equipped with a functioning ignition interlock device.

(ii) The restriction may continue for a period of up to one (1) year after the person's license is no longer suspended or restricted under the provisions of § 5-65-104.

(B) Upon a finding that a person is financially able to afford an ignition interlock device and upon an arrest for a violation of § 5-65-103 for a third or subsequent offense, the office may restrict the offender to operate only a motor vehicle that is equipped with a functioning ignition interlock device for up to one (1) year after the person's license is no longer suspended or restricted under § 5-65-104.

(2) In accordance with the requirements under the provisions of § 5-65-104, the office may issue an ignition interlock restricted license to the person only after the person has verified installation of a functioning ignition interlock device to the office in any motor vehicle the person intends to operate, except for an exemption allowed under subsection (g) of this section.

(3) The office shall establish:

(A) A specific calibration setting no lower than two hundredths of one percent (.02%) nor more than five hundredths of one percent

(.05%) of alcohol in the person's blood at which the ignition interlock device will prevent the motor vehicle's being started; and

(B) The period of time that the person is subject to the restriction.

(4) As used in this section, "ignition interlock device" means a device that connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if a driver's blood alcohol level exceeds the calibration setting on the device.

(b) Upon restricting the offender to the use of an ignition interlock device, the office shall:

(1)(A) State on the record the requirement for and the period of use of the ignition interlock device.

(B) However, if the office restricts the offender to the use of an ignition interlock device in conjunction with the issuance of an ignition interlock restricted license under a provision of § 5-65-104, the period of requirement of use of the ignition interlock device shall be at least the remaining time period of the original suspension imposed under § 5-65-104, and so notify the office;

(2) Ensure that the records of the office reflect that the person may not operate a motor vehicle that is not equipped with an ignition interlock device;

(3) Attach or imprint a notation on the driver's license of any person restricted under this section stating that the person may operate only a motor vehicle equipped with an ignition interlock device;

(4) Require the person restricted under this section to show proof of installation of a certified ignition interlock device prior to the issuance by the office of an ignition interlock restricted license under a provision of § 5-65-104;

(5) Require proof of the installation of the ignition interlock device and periodic reporting by the person for verification of the proper operation of the ignition interlock device;

(6) Require the person to have the ignition interlock device serviced and monitored at least every sixty-seven (67) days for proper use and accuracy by an entity approved by the Division of Health of the Department of Human Services; and

(7)(A) Require the person to pay the reasonable cost of leasing or buying and monitoring and maintaining the ignition interlock device.

(B) The office may establish a payment schedule for the reasonable cost of leasing or buying and monitoring and maintaining the ignition interlock device.

(c)(1) A person restricted under this section to operate only a motor vehicle that is equipped with an ignition interlock device may not solicit or have another person start or attempt to start a motor vehicle equipped with an ignition interlock device.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(d)(1) A person may not start or attempt to start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person who is restricted under this

section to operate only a motor vehicle that is equipped with an ignition interlock device.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(e)(1) A person may not tamper with or in any way attempt to circumvent the operation of an ignition interlock device that has been installed in a motor vehicle.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(f)(1) A person may not knowingly provide a motor vehicle not equipped with a functioning ignition interlock device to another person who the provider of the vehicle knows or should know was restricted to operate only a motor vehicle equipped with an ignition interlock device.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(g)(1) Any person found to have violated subsections (c)-(f) of this section is guilty of a Class A misdemeanor.

(2) However, the penalty provided in subdivision (g)(1) of this section does not apply if:

(A) The starting of a motor vehicle or the request to start a motor vehicle equipped with an ignition interlock device is done for the purpose of safety or mechanical repair of the ignition interlock device or the motor vehicle and the person subject to the restriction does not operate the motor vehicle; or

(B)(i) The court finds that a person is required to operate a motor vehicle in the course and scope of the person's employment and, if the motor vehicle is owned by the employer, that the person may operate that motor vehicle during regular working hours for the purposes of his or her employment without installation of an ignition interlock device if the employer has been notified of the driving privilege restriction and if proof of that notification is with the motor vehicle.

(ii) However, the employment exemption in subdivision (g)(2)(B)(i) does not apply if the business entity that owns the motor vehicle is owned or controlled by the person who is prohibited from operating a motor vehicle not equipped with an ignition interlock device.

(h) If the person restricted under this section cannot provide proof of installation of a functioning ignition interlock device to the office under subsection (a) of this section, the office shall not issue an ignition interlock restricted license as authorized under this section.

(i) In addition to any other penalty authorized under this section, if the office finds that a person has violated a condition under this section related to the proper use, circumvention, or maintenance of an ignition interlock device, the office shall revoke the ignition interlock restricted license and reinstate a license suspension for the term of the original license suspension.

(j) Any person whose license was suspended under § 5-65-104 who would otherwise be eligible to obtain an ignition interlock restricted license may petition the office for a hearing and the office or its

designated official may issue an ignition interlock restricted license as authorized under the applicable provisions of §§ 5-65-104 and 5-65-205.

(k)(1) The division shall:

(A) Certify the ignition interlock devices for use in this state,

(B) Approve the entities that install and monitor the ignition interlock devices; and

(C) Adopt rules and regulations for the certification of the ignition interlock devices and ignition interlock device installation.

(2) The rules and regulations shall require an ignition interlock device, at a minimum, to:

(A) Not impede the safe operation of the motor vehicle;

(B) Minimize the opportunities to be bypassed;

(C) Work accurately and reliably in an unsupervised environment;

(D) Properly and accurately measure the person's blood alcohol levels;

(E) Minimize the inconvenience to a sober user; and

(F) Be manufactured by an entity that is responsible for installation, user training, and servicing and maintenance of the ignition interlock device, and that is capable of providing monitoring reports to the office.

(3) The division shall develop a warning label to be affixed to any ignition interlock device used in the state to warn any person of the possible penalties for tampering with or attempting to circumvent the ignition interlock device.

(4) The division shall:

(A) Publish and update a list of certified ignition interlock device manufacturers and approved ignition interlock device installers; and

(B) Periodically provide the list required by subdivision (k)(4)(A) of this section to the office.

History. Acts 1993, No. 298, § 1; 1995, No. 1296, § 8; 1999, No. 1468, § 2; 2001, No. 1206, § 2; 2001, No. 1501, § 2; 2005, No. 1234, § 2.

Amendments. The 2001 amendment by No. 1206 inserted "for a first or second offense" in present (a)(1)(A); added (a)(1)(B); substituted "office" for "Office of Driver Services" in (a)(2); redesignated

former (a)(3) as present (a)(3)(A) and (a)(3)(B); and made minor stylistic changes throughout.

The 2001 amendment by No. 1501, in (i), deleted "prior to July 30, 1999" following "§ 5-65-104" and substituted "§§ 5-65-104 and 5-65-205" for "§ 5-65-104."

The 2005 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

Enforcement.

The circuit court has no authority to

issue a writ of prohibition preventing a municipal court's enforcement of subdivi-

sion (a)(1) of this section. *State v. Wilcox*, 325 Ark. 429, 927 S.W.2d 337 (1996).

Cited: *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996).

5-65-119. Distribution of fee.

(a) The Office of Driver Services shall charge a fee to be calculated as provided under subsection (b) of this section for reinstating a driving privilege suspended or revoked because of an arrest for operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood, § 5-65-103, or refusing to submit to a chemical test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance contents of the person's blood or breath, § 5-65-205, and the fee shall be distributed as follows:

(1) Seven percent (7%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services;

(2) Thirty-three percent (33%) of the revenues derived from this fee shall be deposited as special revenues into the State Treasury into the Constitutional Officers Fund and the State Central Services Fund as a direct revenue to be used by the Office of Driver Services for use in supporting the administrative driver's licensing revocation and sanctions programs provided for in this subchapter;

(3) Ten percent (10%) of the revenues derived from this fee shall be deposited into the State Treasury, and the Treasurer of State shall credit them as general revenues to the various funds in the respective amounts to each and to be used for the purposes as provided in the Revenue Stabilization Law, § 19-5-101 et seq.; and

(4) Fifty percent (50%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues to the credit of the Department of Arkansas State Police Fund.

(b)(1)(A) The reinstatement fee shall be calculated by multiplying one hundred fifty dollars (\$150) by each separate occurrence of an offense resulting in an administrative suspension order under § 5-65-103 or § 5-65-205 unless the administrative suspension order has been removed because:

(i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) A de novo review of the administrative suspension order by the Office of Driver Services results in the removal.

(B) The fee under this section is supplemental to and in addition to any fee imposed under § 5-65-304, § 5-65-310, § 27-16-508, or § 27-16-808.

(2) As used in this subsection, "occurrence" means each separate calendar date when an offense or offenses take place.

History. Acts 1995, No. 802, § 2; 2001, No. 561, § 6; 2003, No. 1001, § 1; 2005, No. 1992, § 1.

A.C.R.C. Notes. Acts 1995, No. 802, § 5, provided, in part, that this section, “regarding the charging of the reinstatement fee for the driver licenses suspended for driving while intoxicated offenses shall be effective on July 1, 1995.”

Amendments. The 2001 amendment inserted “of the Revenue Division of the Department of Finance and Administration” in the introductory language and deleted it following “Office of Driver Services” in (2); in the introductory language, substituted “an alcohol concentration of eight-hundredths (0.08) or more in the person’s breath or” for “one-tenth of one percent (0.1%) or more by weight of alcohol in the person’s” and inserted “or

breath”; and substituted “Office of Alcohol Testing of the Department of Health” for “Department of Health’s Blood Alcohol Program” in (1).

The 2003 amendment, in the introductory paragraph, substituted “one hundred fifty dollars (\$150)” for “seventy-five dollars (\$75.00)”; substituted “Seven percent (7%)” for “Fourteen percent (14%)” in (1); substituted “Thirty-three percent (33%)” for “Sixty-six percent (66%)” in (2); substituted “Ten percent (10%)” for “Twenty percent (20%)” in (3); and added (4) and made related changes.

The 2005 amendment added the subsection (a) designation; substituted “to be calculated as provided under subsection (b) of this section” for “of one hundred fifty dollars (\$150)” in present (a); and added (b).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-65-120. Restricted driving permit.

(a) Following an administrative hearing for suspension or revocation of a driver’s license as provided for in § 5-65-402, or upon a request of a person whose privilege to drive has been denied or suspended, the Office of Driver Services or its designated agent may modify the denial or suspension in a case of extreme and unusual hardship by the issuance of a restricted driving permit when, upon a review of the person’s driving record for a time period of five (5) years prior to the current suspension or denial of driving privilege, at the discretion of the office or its designated agent it is determined that:

(1) The person:

(A) Is not a multiple traffic law offender; or

(B) Does not present a threat to the general public; and

(2) No other adequate means of transportation exists for the person except to allow driving in any of the following situations:

(A) To and from the person’s place of employment;

(B) In the course of the person’s employment;

(C) To and from an educational institution for the purpose of attending a class if the person is enrolled and regularly attending a class at the institution;

(D) To and from the alcohol safety education and treatment course for drunk drivers; or

(E) To and from a hospital or clinic for medical treatment or care for an illness, disease, or other medical condition of the person or a family member.

(b) The restricted driving permit shall state the specific times and circumstances under which driving is permitted.

(c) The restricted driving permit shall not be granted to any person suspended for a second or subsequent offense of violating § 5-65-103, § 5-65-205, § 5-65-303, or § 5-65-310.

(d) For any arrest or offense occurring before July 30, 1999, and the offense has not reached a final disposition as to judgment in court, the offense shall be decided under the law in effect at the time the offense occurred, and any defendant is subject to the penalty provisions in effect at that time and not under the provisions of this section.

History. Acts 1995, No. 802, §§ 3, 5; 1997, No. 1325, § 3; 1999, No. 1077, § 14.

A.C.R.C. Notes. As enacted by Acts 1995, No. 802, § 3, subsection (a) of this section began: "Upon the effective date of this act". Acts 1995, No. 802, § 5, provided: "Sections 1, 3, and 4 of this act shall be effective for all arrests or offenses occurring on or after July 1, 1996."

Publisher's Notes. Acts 1995, No. 802, § 5(a), is also codified, in part, as § 5-65-205(c).

Acts 1995, No. 802, § 5(a), provided: "(a) Sections 1, 3, and 4 of this act shall be effective for all arrests or offenses occurring on or after July 1, 1996. For all arrests or offenses occurring before July 1, 1996, but which have not reached a final disposition as to judgement in court, the offenses shall be decided under the law in effect at the time the offense occurred and any defendant shall be subject to the penalty provisions in effect at that time and not under the provisions of this act."

SUBCHAPTER 2 — CHEMICAL ANALYSIS OF BODY SUBSTANCES

SECTION.

5-65-201. Rules and regulations.

5-65-202. Implied consent.

5-65-203. Administration.

5-65-204. Validity — Approved methods.

SECTION.

5-65-205. Refusal to submit.

5-65-206. Evidence in prosecution.

5-65-207. Alcohol testing devices.

5-65-208. Collisions — Testing required.

A.C.R.C. Notes. References to "this subchapter" in §§ 5-65-201 — 5-65-207 may not apply to § 5-65-208 which was enacted subsequently.

Effective Dates. Acts 1969, No. 17, § 2: Jan. 30, 1969. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the drinking driver is a major cause of automobile accidents; that the ability of a driver is seriously impaired when there is 0.10 percent or more by weight of alcohol in the driver's blood, urine, breath or other bodily substance; and that enactment of this act will provide for more effective control of the drinking driver. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1969, No. 106, § 4: Feb. 25, 1969.

Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the drinking driver is a major cause of automobile accidents; that the ability of a driver is seriously impaired when there is 0.10 percent or more by weight of alcohol in the driver's blood, urine, breath or other bodily substance; and that enactment of this act is immediately necessary to provide for more effective control of the drinking driver. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1971, No. 306, § 2: Mar. 17, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that doctors, nurses and hospitals throughout the State are called upon by

law enforcement officers to withdraw blood for purposes of determining alcoholic content thereof from individuals suspected of driving while under the influence of intoxicating liquors; that in the performance of such duties, doctors, nurses and hospitals are assisting the State of Arkansas in the enforcement of laws designed to promote motor vehicle safety; and that doctors, nurses and hospitals should not be held liable for violating any of the criminal laws in connection with the administering of such blood tests, nor should they be held liable for civil damages in connection therewith, unless such services are performed with negligence; and that the immediate passage of this Act is necessary to clarify the liabilities of doctors, nurses and hospitals in the administration and enforcement of the implied consent law of this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 660, § 3: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that physicians, persons under the direction and supervision of physicians, and institutions throughout the State are called upon by law enforcement officers to withdraw blood for purposes of determining alcoholic content thereof from individuals suspected of driving while under the influence of intoxicating liquors; that in the performance of such duties physicians, persons under the direction and supervision of physicians and institutions are assisting the State of Arkansas in the enforcement of laws designed to promote motor vehicle safety; and that such persons and institutions shall not be held liable for violating any of the criminal laws in connection with the administering of such blood tests, nor should they be held liable for civil damages in connection therewith, unless such services are performed with negligence; and that the immediate passage of this Act is necessary to clarify the liabilities of doctors, persons under the direction and supervision of physicians, and institutions in the administration and enforcement of the implied consent law of this State. Therefore, an emergency is hereby declared to exist, and

this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 549, § 19: Mar. 21, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the act of driving a motor vehicle while under the influence of intoxicating alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state, and that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior. Further, it is found that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety and rehabilitation and treatment programs both to prevent an increase in the use of intoxicating alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses. Therefore, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1985, No. 169, § 3: Feb. 22, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that hospitals, other institutions and persons working under the direction and supervision of physicians are not accorded tort immunity for the withdrawal of blood to determine alcohol or controlled substance content; that such immunity existed prior to the enactment of the DWI Law in 1983; that the elimination of the tort immunity was inadvertent and should be immediately reinstated. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 75, § 3: Feb. 19, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law identifying circumstances under which persons who operate or are in actual physical control of a motor vehicle are deemed to have given consent to chemical tests to determine whether they have been driving while intoxicated does not apply when the

driver is involved in a nonfatal accident and is not actually operating the motor vehicle at the time the police arrive and is not arrested as a result of the accident; that the failure to include such circumstance was inadvertent and should be immediately corrected in order to provide for the proper enforcement of our DWI law; and that this act will make that correction in the DWI law. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 277, § 3: Mar. 17, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that at least one trial court judge has indicated that the DWI implied consent statute might be unconstitutional because no maximum period for the suspension of operators' licenses is indicated; that the implied consent statute is a vital weapon in combatting drunken driving; and that this act will cure the constitutional objections. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 132, § 5: Feb. 15, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of Ark. Code Ann. § 5-65-202(a), as interpreted by the Supreme Court of Arkansas and Arkansas Court of Appeals, are inadequate regarding the conduct of persons whom the General Assembly intended to be subject to the provisions of the implied consent law, in that the courts have construed § 5-65-202(a)(3) to be applicable only where a police officer physically stopped a moving vehicle and possessed reasonable suspicion to believe that the person was DWI prior to the stop, see *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985); *Gober v. State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987); that § 5-65-202(a)(3) is being amended to implement the General Assembly's intent to have the implied consent law encompass conduct of persons whom police officers have reasonable cause to believe have committed the offense of DWI, at the time such persons are

arrested for DWI. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, safety, and welfare shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 9: Mar. 27, 1995. Emergency clause provided: Emergency clause provided: "It is hereby found and determined by the General Assembly that this act provides for administrative revocation and suspension of drivers' licenses for persons charged with the offense of driving while intoxicated; that based on Arkansas Crime Information Center statistics on DEI arrests, the Office of Driver Services could anticipate up to sixteen thousand (16,000) hearings if everyone arrested requested a hearing; that funds will be necessary for additional staff to handle this program along with significant costs to prepare for and implement this program; and that this act is necessary immediately in order to insure that sufficient funds are available for the financial stability of this program. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 802, § 5(a): Sections 1, 3, and 4 effective for all arrests or offenses occurring on or after July 1, 1996.

Acts 1995, No. 802, § 5(b): Section 2 effective July 1, 1995.

Acts 2005, No. 886, § 3: Mar. 16, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that confusion exists regarding the admissibility of drug analyses made by the State Crime Laboratory in certain cases due to a recent decision by the Arkansas Court of Appeals; that a standard of admissibility of analyses made by the State Crime Laboratory must be established; and that this act is immediately necessary in order to prosecute pending cases and cases filed in the future. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Gov-

error, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the

Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Admissibility in criminal case of blood alcohol test where blood was taken despite defendant's objection or refusal to submit to test. 14 ALR 4th 690.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test. 19 ALR 4th 509.

Admissibility in criminal case that accused refused to take sobriety test. 26 ALR 4th 1112.

Motorist's right to private sobriety test. 45 ALR 4th 11.

Ark. L. Rev. Case Note, South Dakota v. Neville: Refusal to Submit to a Blood-Alcohol Test as Evidence of Intoxication, 37 Ark. L. Rev. 702.

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

Legislative Survey, Torts, 8 UALR L.J. 607.

Survey — Evidence, 10 UALR L.J. 199.

5-65-201. Rules and regulations.

The Division of Health of the Department of Health and Human Services may promulgate rules and regulations reasonably necessary to carry out the purposes of this subchapter.

History. Acts 1969, No. 106, § 2; A.S.A. 1947, § 75-1046.

CASE NOTES

Cited: Watson v. Frierson, 272 Ark. 316, 613 S.W.2d 824 (1981); Hughes v. State, 17 Ark. App. 34, 705 S.W.2d 455 (1986); Porter v. State, 82 Ark. App. 589, 120 S.W.3d 178 (2003).

5-65-202. Implied consent.

(a) Any person who operates a motor vehicle or is in actual physical control of a motor vehicle in this state is deemed to have given consent, subject to the provisions of § 5-65-203, to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood if:

(1) The person is arrested for any offense arising out of an act alleged to have been committed while the person was driving while intoxicated or driving while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood;

(2) The person is involved in an accident while operating or in actual physical control of a motor vehicle; or

(3) At the time the person is arrested for driving while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating or in actual physical control of a motor vehicle, is intoxicated or has an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to the provisions of § 5-65-203.

History. Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 75, § 1; 1993, No. 132, § 1; 2001, No. 561, § 7.

Amendments. The 2001 amendment

inserted “breath or” in the introductory language in (a) and (a)(1); and substituted “an alcohol concentration of eight-hundredths (0.08) or more in the person’s breath or blood” for “one-tenth of one percent (0.10%) or more of alcohol in the person’s blood” in (a)(1) and (a)(3).

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Procedure, 10 UALR L.J. 567.

Survey of Legislation, 2001 Arkansas

General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

- Constitutionality.
- In general.
- Purpose.
- Additional tests.
- Admonition forms.
- Assistance of counsel.
- Conviction.
- Evidence.
- Lesser included offenses.
- Operation or control of vehicle.
- Reasonable cause.
- Submission to testing.
- Testing options.
- Violation.

Constitutionality.

Blood alcohol test results are admissible under the implied consent law; this law is valid and does not violate the provision against self-incrimination. *Steele v. State*, 284 Ark. 340, 681 S.W.2d 354 (1984).

Admission into evidence of defendant’s refusal to submit to a chemical test did not violate her Fifth Amendment right against self-incrimination. *Weaver v. City of Fort Smith*, 29 Ark. App. 129, 777 S.W.2d 867 (1989).

In General.

Motorists give an implied consent to chemical tests for alcoholic content of blood. *Mercer v. State*, 256 Ark. 814, 510 S.W.2d 539 (1974).

Purpose.

The intent of the General Assembly in passing this section was to mandate alcohol testing for a person stopped by a law enforcement officer when that officer has reasonable cause to believe the driver is drunk. *Parsons v. State*, 313 Ark. 224, 853 S.W.2d 276 (1993).

Additional Tests.

Requiring that a person be advised of his right to an additional test, under the circumstances outlined in subsection (b) of this section would render that provision meaningless. It is clear that a person incapable of refusing or consenting to being tested for blood alcohol levels need not be advised of his right to additional tests, because such a literal application of § 5-65-204(e) would lead to absurd consequences. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Admonition Forms.

Arkansas does not have a statutorily prescribed implied-consent admonition form. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993).

Assistance of Counsel.

There is no constitutional right to counsel in connection with this chemical test. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Defendant’s conviction was affirmed

even though he claimed that he was confused by the conduct of the law enforcement officers, in that after being given his Miranda rights, he was then read his rights under the implied consent statute, and he was told that he did not have a right to consult with his attorney prior to taking the breathalyzer test. *Carroll v. State*, 35 Ark. App. 141, 814 S.W.2d 913 (1991).

Conviction.

A defendant does not have to be convicted of DWI before he can be convicted of refusing to submit to a blood test. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992); *Huitt v. State*, 39 Ark. App. 69, 837 S.W.2d 482 (1992).

The Court of Appeals held that *Gober v. State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987), was wrongly decided and overruled *Gober* to the extent that it holds that a DWI conviction is a prerequisite to a conviction for refusing a blood alcohol test pursuant to § 5-65-202(a)(1) (Supp. 1989). *Huitt v. State*, 39 Ark. App. 69, 837 S.W.2d 482 (1992).

Evidence.

Arrest is not necessarily a prerequisite before blood alcohol content, determined pursuant to sample, would be admissible in evidence. *Mercer v. State*, 256 Ark. 814, 510 S.W.2d 539 (1974) (decision under prior law).

Where defendant was stopped by police officers because of his driving and after the officers talked with defendant, defendant turned and shot officer and thereafter both officers and defendant were injured and taken to hospital and the treating physician ordered a blood test on defendant and such defendant was charged with assault with intent to kill, the provisions of §§ 5-65-202 — 5-65-205 with regard to the taking of a blood test had no application. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision under prior law).

Evidence held sufficient to find that there was ample cause for the officer to require defendant to submit to a breath test. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger

of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under ARCrP 3.1, and the evidence of driving while intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985) (decision under prior law).

Conviction for violation of this section upheld where defendant failed the field sobriety tests and refused to submit to a breathalyzer test, and where two police officers smelled intoxicants on defendant; the evidence was sufficient for police to have a reasonable belief that defendant was intoxicated. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

Lesser Included Offenses.

Violation of the implied consent law is not a lesser included offense of driving while intoxicated, and the offense of driving while intoxicated is not a lesser included offense of violation of the implied consent law. *Frana v. State*, 323 Ark. 1, 912 S.W.2d 930 (1996).

Operation or Control of Vehicle.

The phrase "while operating or in actual physical control of a motor vehicle" sets forth a condition precedent to a violation of the implied-consent law as set forth in subsection (a)(3); thus, a defendant was entitled to a reversal of his conviction under this section where he was not in actual physical control of a vehicle when he refused to take a breath test. *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000).

Reasonable Cause.

This section does not expressly require that an officer develop a reasonable belief of intoxication before a stop is made. *Parsons v. State*, 313 Ark. 224, 853 S.W.2d 276 (1993).

The time a police officer must develop a reasonable belief of intoxication is only at the time of arrest. *Parsons v. State*, 313 Ark. 224, 853 S.W.2d 276 (1993).

Police officer's observations of the smell of alcohol and defendant's bloodshot eyes, coupled with the fact that defendant refused a portable breath test and admitted to the officer that he had been drinking, were sufficient to constitute reasonable cause that he was intoxicated; the trial court's ruling denying defendant's motion to suppress the breathalyzer results was not clearly against the preponderance of

the evidence. *Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003).

Submission to Testing.

A defendant need not be apprised of the consequences of refusing to submit to a chemical test. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993).

Testing Options.

Where the officer gave the motorist the option of submitting to either a urine or a blood test, the motorist could not properly refuse without penalty. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

Violation.

A violation of this section occurs when a

police officer has reasonable cause to believe the operator or person in actual physical control of a motor vehicle is intoxicated, the police officer directs the operator to submit to a blood test, and the operator refuses to do so. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

Cited: *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990); *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992).

5-65-203. Administration.

(a) A chemical test shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating or in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood.

(b)(1) The law enforcement agency by which the law enforcement officer is employed shall designate which chemical test shall be administered, and the law enforcement agency is responsible for paying any expense incurred in conducting the chemical test.

(2) If the person tested requests that an additional chemical test be made, as authorized in § 5-65-204(e), the cost of the additional chemical test shall be borne by the person tested, unless the person is found not guilty, in which case the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.

(3) If any person objects to the taking of his or her blood for a chemical test, as authorized in this chapter, the breath or urine of the person may be used to make the chemical analysis.

History. Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 75, § 1; 2001, No. 561, § 8.

Amendments. The 2001 amendment substituted "an alcohol concentration ... breath or blood" for "one-tenth of one per-

cent (0.10%) or more of alcohol in the person's blood" in (a); redesignated former (b) through (b)(2) as present (b)(1) through (b)(3); deleted "aforesaid" preceding "tests shall be" in (b)(1); added "unless the person ... the additional tests" in (b)(2); and substituted "in this chapter" for "herein" in (b)(3).

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Procedure, 10 UALR L.J. 567.
Survey of Legislation, 2001 Arkansas

General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Applicability.
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Applicability.

Where defendant was stopped by police officers because of his driving and after the officers talked with defendant, defendant turned and shot officer and thereafter both officers and defendant were injured and taken to hospital and the treating physician ordered a blood test on defendant and such defendant was charged with assault with intent to kill, the provisions of §§ 5-65-202 — 5-65-205 with regard to the taking of a blood test had no application. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision prior to 1983 amendment).

Additional Tests.

Where the evidence disclosed that the arresting officer did not advise the defendant driver that if he objected to the taking of his blood for a blood alcohol test, a breath or urine test might be taken at his own expense, did not mean that all testimony with regard to the test was inadmissible under the provisions of § 5-65-204(e); since the defendant did not have any test results introduced into evidence against him, he was not deprived of any statutory rights when the trial court permitted the arresting officer to testify that the defendant refused to submit to a blood alcohol test. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

The statutory remedy for a person who is not afforded the opportunity to obtain an additional test as provided under this section is exclusion of any chemical test taken at the direction of law enforcement officers pursuant to § 5-65-204(e). *Grayson v. State*, 30 Ark. App. 105, 783 S.W.2d 75 (1990).

Certification of Officers.

The Court of Appeals could not consider the defendant's argument that the state failed to prove that the police officer was certified where the defendant failed to object to the police officer's testimony or

question his status upon cross-examination, but instead first raised the issue in his motion for directed verdict at the close of the state's case. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Expenses.

If a particular law enforcement agency designates that chemical tests will be administered, the agency is responsible for paying any expenses involved, but if the accused requests the tests, he shall bear the expense. *Ballew v. State*, 305 Ark. 542, 809 S.W.2d 374 (1991).

Reasonable Cause.

Evidence held sufficient to find that there was ample cause for the officer to require defendant to submit to a breath test. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Where defendant was not arrested for any act committed while driving while intoxicated, nor was he involved in a fatal accident or stopped by an officer who had reasonable cause to believe that he was intoxicated, defendant was not deemed to have consented to take the blood alcohol test even though he was found in physical control of a vehicle while intoxicated. *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under ARCrP 3.1, and the evidence of driving while intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985).

Where an officer detects a defendant's flushed appearance, slurred speech, and uneasiness on his feet, along with the odor of alcohol, ample cause for requiring the breath test exists. *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992).

Testing Options.

Where the officer gave the motorist the option of submitting to either a urine or a blood test, the motorist could not properly refuse without penalty. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

Cited: *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Watson v.*

Frierson, 272 Ark. 316, 613 S.W.2d 824 (1981); Gullett v. State, 18 Ark. App. 97, 711 S.W.2d 836 (1986); State v. Schaub, 310 Ark. 76, 832 S.W.2d 843 (1992); Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996); Peterson v. State, 81 Ark. App. 226, 100 S.W.3d 66 (2003).

5-65-204. Validity — Approved methods.

(a)(1) “Alcohol concentration” means either:

(A) Grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood; or

(B) Grams of alcohol per two hundred ten liters (210 l) of breath.

(2) The alcohol concentration of other bodily substances is based upon grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood, the same being percent weight per volume or percent alcohol concentration.

(b)(1)(A) A chemical analyses made to determine the presence and amount of alcohol of a person’s blood, urine, or breath to be considered valid under the provisions of this act shall be performed according to a method approved by the Division of Health of the Department of Health and Human Services or by an individual possessing a valid permit issued by the division for this purpose.

(B) The division may:

(i) Approve satisfactory techniques or methods for the chemical analysis;

(ii) Ascertain the qualifications and competence of an individual to conduct the chemical analysis; and

(iii) Issue a permit that is subject to termination or revocation at the discretion of the division.

(2) However, a method of chemical analysis of a person’s blood, urine, or other bodily substance made by the State Crime Laboratory for determining the presence of one (1) or more controlled substances or any intoxicant is exempt from approval by the division or the State Board of Health.

(c) To be considered valid under the provisions of this section, a chemical analysis of a person’s blood, urine, breath, or other bodily substance for determining the alcohol content of the blood or breath shall be performed according to a method approved by the board.

(d)(1) When a person submits to a blood test at the request of a law enforcement officer under a provision of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.

(2) The limitation in subdivision (d)(1) of this section does not apply to the taking of a breath or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (e)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.

(3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or to his or her attorney.

History. Acts 1969, No. 106, §§ 1, 2; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; 1985, No. 169, § 1; A.S.A. 1947, §§ 75-1045, 75-1046; Acts 1989, No. 361, § 1; 2001, No. 561, §§ 9, 10; 2005, No. 886, § 1.

Publisher's Notes. Subsections (b) and (c) of this section may conflict as to whether the chemical analyses referred to must be performed according to methods established by the Department of Health or by the State Board of Health. The State Board of Health was established by Acts 1913, No. 96, and was subsequently transferred to the Department of Health by Acts 1971, No. 38, § 11 by a type 4 transfer. However, Acts 1913, No. 96 has been amended since 1971 and the State Board of Health still exists.

Amendments. The 2001 amendment, in (c), inserted "or breath" and deleted "Arkansas" preceding "State Board of Health"; redesignated the three sentences in former (e) as present (e)(1) through (e)(3); substituted "the person in writing ... additional test" for "the person of this right" in (e)(2); and, in (e)(3), substituted "advise a person" for "advise such person" and "obtain a test" for "obtain such test."

The 2005 amendment redesignated former (b) as present (b)(1); substituted "made to determine the presence and amount of alcohol of the person's blood" for "a person's blood" in present (b)(1); and added (b)(2).

Meaning of "this act". See note to § 5-65-201.

RESEARCH REFERENCES

UALR L.J. Seventeenth Annual Survey of Arkansas Law — Criminal Procedure, 17 UALR L.J. 449.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Construction.
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Construction.

Section 5-65-103(b), as amended in 2001, sets the legal limit for blood alcohol concentration and must be read in conjunction with subdivision (a)(1) of this section, which defines the alcohol concentration computation; hence, where defendant stipulated that his blood alcohol concentration as revealed in breathalyzer test results was 0.109, his conviction for per se violation of § 5-65-103(b) was affirmed on appeal. *Bramlett v. State*, 356 Ark. 200, 148 S.W.3d 278 (2004).

Applicability.

This section is limited to those tests ordered either by a police officer or a defendant in connection with a criminal charge relating to sobriety. *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

The requirements set out in this section need not be met when the blood test is not ordered by the police or the defendant for use as evidence at trial, but has been ordered by hospital personnel for their own use in connection with the treatment of a patient. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993).

Additional Tests.

Where there was other evidence of intoxication which made, of itself, a question of fact, the introduction of evidence that the defendant was not advised of his right to have a person of his choice, in addition to the officer giving the test, to administer the breatholator test furnished no basis for the granting of the motion to dismiss the charge of driving a motor vehicle while under the influence of intoxicants. *Small v. City of Little Rock*, 253 Ark. 7, 484 S.W.2d 81 (1972).

Where defendant had refused to take an intoximeter test, the introduction of the refusal into evidence on the charge of driving while under the influence of intoxicants was not prejudicial even though defendant had not been advised that the arresting officer would have assisted him in securing an independent medical opinion. *Fletcher v. City of Newport*, 260 Ark. 476, 541 S.W.2d 681 (1976).

Blood alcohol level breathalyzer test results were admissible in a prosecution for driving while intoxicated where the arresting officers advised the defendant that he could request a different type of test, but the defendant did not request a different test, even though the officers failed to advise him that he had the right to have a qualified person administer additional tests of his choosing. *Doyle v. Jackson County Nat'l Bank*, 284 Ark. 303, 681 S.W.2d 371 (1984).

Where the evidence disclosed that the arresting officer did not advise the defendant driver that if he objected to the taking of his blood for a blood alcohol test, a breath or urine test might be taken at his own expense, did not mean that all testimony with regard to the test was inadmissible under the provisions of subsection (e); since the defendant did not have any test results introduced into evidence against him, he was not deprived of any statutory rights when the trial court permitted the arresting officer to testify that the defendant refused to submit to a blood alcohol test. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

It is clear that subsection (e) requires that a person be advised of his or her right to a second test, but it does not dictate that a written waiver of that test be obtained; therefore, a written waiver of rights form is not a mandatory prerequisite of the foundation needed to be laid prior to introduction of any breathalyzer test results. *Robertson v. State*, 12 Ark. App. 243, 674 S.W.2d 947 (1984).

Written warning held to be sufficient compliance with this section since subsection (e) only requires that an individual be advised that he can have tests "in addition to any test administered at the direction of a law enforcement officer." *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

Subsection (e) only requires a police officer's reasonable assistance in helping an accused obtain an additional blood alcohol test; it does not require the officer to pay for the additional test. *Williford v. State*, 284 Ark. 449, 683 S.W.2d 228 (1985).

Testimony held to constitute sufficient evidence by which the trier of fact could have concluded that the defendant did not ask for a different test. *Girdner v. City of Kensett*, 285 Ark. 70, 684 S.W.2d 808 (1985).

Where the police, after administering a blood test to the defendant, advised the defendant that he had a right to an additional blood or urine test, the police substantially complied with the requirements of subsection (e) even though they did not mention an additional breath test; substantial compliance with subsection (e) is all that is required for the result of the test to be admitted into evidence. *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985).

Where defendant was fully advised of his right to an additional test, and his request that his own physician in another city perform the test was refused, the results of the intoxilyzer test were properly admitted; the provision for assistance does not extend to transporting the accused to another locale, when there is no showing that facilities at the place of arrest are inadequate to perform the necessary tests. *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985).

Breathalyzer test results were inadmissible where defendant, who was not advised of the full range of tests available to him, requested an additional test and this test was not given nor was defendant aided in obtaining another test. *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985).

The results of the breath test were admissible even though the defendant was not advised that he had a right to an additional breath test pursuant to subsection (e) of this section where he was asked if he wanted a blood test and he was allowed five or six phone calls to raise the money for a blood test, even though he was unsuccessful, and no additional test was administered. *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985).

Defendant was properly advised of his

right to a second test. *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Defendant was not denied due process of law because he was not informed of his right to an independent test for intoxication. There is no such requirement unless he is given a test at the direction of a law enforcement officer. *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).

Requiring that a person be advised of his right to an additional test, under the circumstances outlined in § 5-65-202(b) would render that provision meaningless. It is clear that a person incapable of refusing or consenting to being tested for blood alcohol levels need not be advised of his right to additional tests, because such a literal application of subsection (e) of this section would lead to absurd consequences. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

Law enforcement personnel adequately assisted defendant in obtaining additional blood alcohol testing as required by subdivision (e)(2). *Fiegel v. City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989).

The statutory remedy for a person who is not afforded the opportunity to obtain an additional test as provided under § 5-65-203 is exclusion of any chemical test taken at the direction of law enforcement officers pursuant to subsection (e). *Grayson v. State*, 30 Ark. App. 105, 783 S.W.2d 75 (1990).

Where no breathalyzer test was completed, the arresting officer was not required to advise the defendant of his right to an additional chemical test or assist him in obtaining it. *McEntire v. State*, 305 Ark. 470, 808 S.W.2d 762 (1991).

Where a breathalyzer test was refused by defendant, there was no requirement under this section that an independent chemical test be afforded her. *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992).

In order to comply with the "permit and assist" provision of subdivision (e)(2) of this section, the officer must provide only such assistance for additional testing as is reasonable at the place and time of the particular case. *Hudson v. State*, 43 Ark. App. 190, 863 S.W.2d 323 (1993).

Assistance offered to the defendant by the police officer was reasonable under the circumstances and the officer's actions constituted substantial compliance with subsection (e) of this section. *Hudson v.*

State, 43 Ark. App. 190, 863 S.W.2d 323 (1993).

Trial court properly admitted blood-alcohol test results, although destruction of sample prevented additional tests, where defendant waived his right to his own analysis, there was no evidence of bad faith, exculpatory value of sample was not apparent, and defendant put on expert evidence that test results could be inaccurate. *Kenyon v. State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997).

Appeals.

A challenge as to the compliance with this section was not considered on appeal where the appellate court held that any error arising from the admission of the test result was harmless in that there was other evidence presented forcefully suggesting that defendant was intoxicated. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

Burden of Proof.

When a defendant moves to exclude a test pursuant to subdivision (e)(2) of this section, the state bears the burden of proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).

In his appeal of a conviction for DWI, defendant successfully challenged the analysis of his urine, which allegedly tested positive for cannabinoids; because the chemical analysis was for an intoxicant other than alcohol and the state failed to meet its burden, under subsection (b) of this section, that the test was done pursuant to required methods or by a certified individual, the trial court erred in finding the test to be admissible. *Tenner v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 723 (Oct. 13, 2004).

Compliance.

In action for damages arising from automobile accident, it was error to admit record of blood sample taken from plaintiff's deceased, where plaintiff objected that the report did not indicate by whom the blood sample was taken, it appearing that a certain person did take the sample but that there was no evidence that this person was a physician or registered

nurse. *Simolin v. Wilson*, 253 Ark. 545, 487 S.W.2d 603 (1972) (decision prior to 1975 amendment).

For cases discussing the prejudicial effect of failure to comply with Department of Health rules and regulations, see *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975); *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979); *Nicholas v. State*, 268 Ark. App. 541, 595 S.W.2d 237 (Ct. App. 1980).

In civil litigation, as well as in criminal cases, substantial compliance with §§ 5-65-202 — 5-65-205 and with the Health Department rules governing blood-alcohol tests, is all that is demanded to make such test results admissible. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975); *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988); *Goode v. State*, 303 Ark. 609, 798 S.W.2d 430 (1990).

Even certified operators may not ignore the Department of Health regulations on operation and maintenance of the chromatograph, if their testimony is to form the basis of a presumption of intoxication. *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979).

Evidence held sufficient to find that there was a sufficient degree of compliance with §§ 5-65-202 — 5-65-205 and the Department of Health's rules so that the test results were admissible. *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985); *Tharp v. State*, 294 Ark. 615, 745 S.W.2d 612 (1988).

Tests used to determine the alcohol content of blood must be carefully monitored to assure reliability; however, only substantial compliance with health department regulations is required. *Tallant v. State*, 42 Ark. App. 150, 856 S.W.2d 24 (1993).

Officer advice concerning defendant's right to an additional test by the person of his choice literally complied with this section, and the trial court's finding of reasonable assistance to obtain another test was not clearly against the preponderance of the evidence. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).

Trial court erred in allowing police officer to testify as to a breathalyzer test because the officer complied with only

part of this section; although the officer advised defendant that he could have an additional test at his own expense and offered to assist him in obtaining one, it was undisputed that the officer failed to advise defendant that he would be reimbursed for the cost of the test if found not guilty. *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003).

Evidence.

Where, in prosecution for driving while intoxicated, the blood alcohol test was not ordered by a defendant or an officer of the law, but was ordered by an emergency room physician for his own use in connection with his treatment of a patient, the question was not whether the test complied with the strict procedures of this section, but whether the test results were admissible under Evid. Rule 803(4). *Weaver v. State*, 290 Ark. 556, 720 S.W.2d 905 (1986).

The trial court did not err by admitting into evidence a breathalyzer log showing all tests performed on the machine for a period of five days, even though the defendant's blood alcohol content was the highest one recorded on it, where the log was admissible for the purpose of showing calibration of the machine and the defendant's test result, and the judge offered to admonish the jury to disregard the other test results or delete them, but the defendant rejected this offer. *Miller v. State*, 19 Ark. App. 36, 715 S.W.2d 885 (1986).

Evidence regarding procedure used to test defendant's blood alcohol held insufficient to allow introduction of test results into evidence. *Mosley v. State*, 22 Ark. App. 29, 732 S.W.2d 861 (1987).

Section 5-65-103(b) states that it is unlawful for a person to operate a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood. However, subsection (a) of this section states that percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred (100) cubic centimeters of blood. *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989).

This section merely sets out conditions affecting the admissibility of the initial breathalyzer test. A question of admissibility is distinguishable from the suppression of evidence contemplated by ARCrP 24.3(b). *Scalco v. State*, 42 Ark. App. 134, 856 S.W.2d 23 (1993).

A showing that a blood alcohol chemical analysis was made by a method approved by the Director of the State Board of Health and/or the Director of the Arkansas State Police, as required by this section, is part of the foundation to be laid for the introduction of the results of such tests or analysis and the burden is upon the state to establish it. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

Results of a blood alcohol chemical analysis test should not have been introduced into evidence without a showing that the procedures performed were in compliance with the Arkansas State Department of Health regulations, as required under this section. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

Although § 5-65-206 does not require a machine operator's testimony, or his certificate, as a prerequisite to the introduction of chemical analysis test results, this section requires a blood sample to be collected in keeping with certain Board of Health methods in order for the test to be admissible in evidence. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

Physician's Direction.

A registered nurse taking a defendant's blood sample following standard hospital policy with a physician on call meets the requirements and purpose of subsection (d), requiring the sample be taken "under the direction and supervision of a physician." *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992).

Second Blood-Alcohol Test.

There is no requirement in subsection (e) of this section that the results of the first blood alcohol test be furnished so that the person tested can decide whether to request a second test; moreover, subsection (e), as currently drafted, makes good common sense. Even without knowing the results of the first test, the person whose blood is examined may well want to have a second test performed immediately to assure the validity and accuracy of the testing procedures. *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994).

Police substantially complied with the requirement of § 5-65-204(e)(3) that they assist defendant in obtaining an independent blood alcohol test, by giving the uncooperative defendant a phone book and directing him to contact a local hospital

upon his release from jail. *Lampkin v. State*, 81 Ark. App. 434, 105 S.W.3d 363 (2003).

Suppression of Evidence.

A motion to exclude evidence of the breathalyzer test on grounds that the officer had failed to advise defendant of his right to an additional test and to assist him in obtaining such a test as required by subsection (e) of this section is not a motion to suppress evidence under ARCrP 16.2. *Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994).

Waiver.

The driver of the automobile cannot waive the requirements as to the method of withdrawing the blood and the method

of testing, inasmuch as the requirements were placed in the statute to assure the public and the driver that they could rely upon the tests in connection with highway safety in general. *Newton v. Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979).

Cited: *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975); *Watson v. Friereson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Hughes v. State*, 17 Ark. App. 34, 705 S.W.2d 455 (1986); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Ballew v. State*, 305 Ark. 542, 809 S.W.2d 374 (1991); *King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993); *Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1994).

5-65-205. Refusal to submit.

(a) If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, as provided in § 5-65-202, no chemical test shall be given, and the person's motor vehicle operator's license shall be seized by the law enforcement officer, and the law enforcement officer shall immediately deliver to the person from whom the motor vehicle operator's license was seized a temporary driving permit, as provided by § 5-65-402.

(b) The Office of Driver Services shall then proceed to suspend or revoke the driving privilege of the arrested person, as provided in § 5-65-402. The suspension shall be as follows:

(1)(A)(i) Suspension for one hundred eighty (180) days for the first offense of refusing to submit to a chemical test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of the person's blood or breath.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the ignition interlock restricted license shall be available immediately.

(iii) The restricted driving permit provision of § 5-65-120 does not apply to this suspension.

(B) The office, in addition to any other penalty, shall deny to that person the issuance of an operator's license until that person has been issued an ignition interlock restricted license for a period of six (6) months;

(2) Suspension for two (2) years, during which no restricted permit may be issued, for a second offense of refusing to submit to a chemical test of blood, breath, or urine for the purposes of determining the alcohol or controlled substance content of the person's blood or breath within five (5) years of the first offense;

(3) Revocation for three (3) years, during which no restricted permit may be issued, for the third offense of refusing to submit to a chemical

test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of the person's blood within five (5) years of the first offense; and

(4) Lifetime revocation, during which no restricted permit may be issued, for the fourth or subsequent offense of refusing to submit to a chemical test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of the person's blood or breath within five (5) years of the first offense.

(c) For any arrest or offense occurring before July 30, 1999, but that has not reached a final disposition as to judgment in court:

(1) The offense shall be decided under the law in effect at the time the offense occurred; and

(2) Any defendant is subject to the penalty provisions in effect at that time and not under the provisions of this section.

(d) In order to determine the number of previous offenses to consider when suspending or revoking the arrested person's driving privileges, the office shall consider as a previous offense:

(1) Any conviction for an offense of operating or being in actual physical control of a motor vehicle while intoxicated or in violation of § 5-65-103 or refusing to submit to a chemical test which occurred prior to July 1, 1996; and

(2) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-103 or violation of § 5-65-205(a) occurring on or after July 1, 1996, when the person was subsequently convicted of the criminal charge.

(e) In addition to any other penalty provided for in this section:

(1) If the person is a resident without a license or permit to operate a motor vehicle in this state, the office shall deny to that person the issuance of a license or permit for a period of six (6) months for a first offense; and

(2) For a second or subsequent offense by a resident without a license or permit to operate a motor vehicle, the office shall deny to that person the issuance of a license or permit for a period of one (1) year.

History. Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 277, § 1; 1995, No. 802, §§ 4, 5; 1999, No. 1077, § 15; 2001, No. 1501, § 3; 2003, No. 1779, § 2; 2005, No. 1234, § 1.

A.C.R.C. Notes. Acts 1995, No. 802, § 5, provided, in part, that this section "shall be effective for all arrests or offenses occurring on or after July 1, 1996."

Publisher's Notes. Acts 1995, No. 802, § 5(a), is also codified, in part, as § 5-65-120(c).

Amendments. The 2001 amendment inserted "of the Revenue Division" in (b);

inserted "or breath" in (b)(1), (b)(2) and (b)(4); added the last two sentences in (b)(1); added "within five (5) years of the first offense; and" in (b)(3); and made minor punctuation changes.

The 2003 amendment redesignated former (b)(1) as present (b)(1)(A); substituted "the interlock restricted license shall be available immediately" for "the suspension time for which no restricted license shall be available shall be a minimum of ninety (90) days" in (b)(1)(A); and added (b)(1)(B).

The 2005 amendment substituted "office allows the" for "court orders" in (b)(1)(A).

CASE NOTES

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Constitutionality.

Admission into evidence of defendant's refusal to submit to a chemical test did not violate her Fifth Amendment right against self-incrimination. *Weaver v. City of Fort Smith*, 29 Ark. App. 129, 777 S.W.2d 867 (1989).

Defendant who received a jury trial lacked standing to raise on appeal the issue that subsection (c) is unconstitutional because it does not provide for a jury trial. *Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993).

Argument that subsection (c) of this section is facially unconstitutional, because it removes from the jury's province the ability to determine whether the arresting officer had reasonable cause to believe the defendant had been driving while intoxicated, was moot in case where the defendant waived his right to a jury trial. *Johnson v. State*, 314 Ark. 471, 863 S.W.2d 305 (1993).

This section is not in violation of the due process or equal protection clauses. *Cook v. State*, 321 Ark. 641, 906 S.W.2d 681 (1995).

Defendant had no standing to challenge the validity of subdivision (e)(1), since defendant was an Arkansas resident at the time of the offense, had not suffered injury as a result of this provision, nor did he belong to a class which is prejudiced by the law. *O'Neill v. State*, 322 Ark. 299, 908 S.W.2d 637 (1995).

Under ARCrP 31.1 and 31.2 and Ark. Const., Art. 2, § 7, a defendant charged under this section has the right to a jury trial, and to the extent that subsection (c) prevents a defendant from having a jury determination, it is unconstitutional. *Medlock v. State*, 328 Ark. 229, 942 S.W.2d 861 (1997).

Consciousness of Guilt.

Evidence of the refusal to submit to a chemical test can properly be admitted as

circumstantial evidence showing consciousness of guilt of a defendant charged with offense of driving while intoxicated, and once admitted, the weight of this evidence is a question to be resolved by the trier of fact, which may also consider the circumstances surrounding the refusal and any explanation given for declining to take the test. *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990).

Conviction.

A defendant does not have to be convicted of DWI before he can be convicted of refusing to submit to a blood test. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

Elements of Offense.

A violation occurs when the police officer has reasonable cause to believe the operator or person in actual physical control is intoxicated, the police officer directs the operator to submit to a blood test, and the operator refuses to do so. *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992).

Intent.

Since a conviction of refusal to submit to a chemical test can be based on any of three culpable mental states, this crime is a general intent crime for which voluntary intoxication is no defense. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985).

Specific intent is not a necessary element of this crime; the mens rea may be satisfied by proof that the accused acted recklessly or knowingly, as well as by proof that the accused acted purposely. *Menard v. State*, 16 Ark. App. 219, 699 S.W.2d 412 (1985).

Notice of Rights.

Where defendant had refused to take an intoximeter test, the introduction of the refusal into evidence on the charge of driving while under the influence of intoxicants was not prejudicial even though defendant had not been advised that the arresting officer would have assisted him in securing an independent medical opinion. *Fletcher v. City of Newport*, 260 Ark. 476, 541 S.W.2d 681 (1976).

Where the evidence disclosed that the arresting officer did not advise the defen-

dant driver that if he objected to the taking of his blood for a blood alcohol test, a breath or urine test might be taken at his own expense, did not mean that all testimony with regard to the test was inadmissible under the provisions of § 5-65-204(e); since the defendant did not have any test results introduced into evidence against him, he was not deprived of any statutory rights when the trial court permitted the arresting officer to testify that the defendant refused to submit to a blood alcohol test. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

If a *Miranda* warning is given in connection with an explanation of the implied consent law, the police officers must explicitly inform the suspect that the *Miranda* rights are not applicable to the decision of whether to take the test. *Wright v. State*, 288 Ark. 209, 703 S.W.2d 850 (1986).

The *Miranda* rights do not apply with respect to taking tests under the implied consent statute; for example, an accused does not have the right to contact an attorney before taking, or refusing to take, the test. *Wright v. State*, 288 Ark. 209, 703 S.W.2d 850 (1986).

Reasonable Cause.

Where defendant was stopped by police officers because of his driving and after the officers talked with defendant, defendant turned and shot officer and thereafter both officers and defendant were injured and taken to hospital and the treating physician ordered a blood test on defendant and such defendant was charged with assault with intent to kill, the provisions of §§ 5-65-202 — 5-65-205 with regard to the taking of a blood test

had no application. *Turner v. State*, 258 Ark. 425, 527 S.W.2d 580 (1975) (decision prior to 1983 amendment).

Evidence held sufficient to find that there was ample cause for the officer to require defendant to submit to a breath test. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Where defendant was not arrested for any act committed while driving while intoxicated, nor was he involved in a fatal accident or stopped by an officer who had reasonable cause to believe that he was intoxicated, defendant was not deemed to have consented to take the blood alcohol test even though he was found in physical control of a vehicle while intoxicated. *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985).

Since defendant's parked car created a traffic hazard, the officers had specific, particular, and articulable reasons to suspect that a misdemeanor involving danger of injury to persons or property was being committed by the defendant; thus, the stop was reasonable under ARCrP 3.1, and the evidence of driving while intoxicated was admissible. *Dacus v. State*, 16 Ark. App. 222, 699 S.W.2d 417 (1985).

Testing Options.

Where the officer gave the motorist the option of submitting to either a urine or a blood test, the motorist could not properly refuse without penalty. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997).

Cited: *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Medlock v. State*, 332 Ark. 106, 964 S.W.2d 196 (1998).

5-65-206. Evidence in prosecution.

(a) In any criminal prosecution of a person charged with the offense of driving while intoxicated, the amount of alcohol in the defendant's breath or blood at the time or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration of four-hundredths (0.04) or less in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration in excess of four-hundredths (0.04) but less than eight-hundredths (0.08) by weight

of alcohol in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) The provisions in subsection (a) of this section shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1)(A) Except as provided in subsection (e) of this section, a record or report of a certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure when duly attested to by the Director of the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services or his or her assistant, in the form of an original signature or by certification of a copy.

(B) These documents are self-authenticating.

(2) However, the instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of the person who performs the calibration test or check on the instrument, the operator of the instrument, or a representative of the office.

(4) The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena given ten (10) days prior to the date of hearing or trial, in which case the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

(e) When a chemical analysis of a defendant's blood, urine, or other bodily substance is made by the State Crime Laboratory for the purpose of ascertaining the presence of one (1) or more controlled substances or any intoxicant, other than alcohol, in any criminal prosecution under § 5-65-103, § 5-65-303, or § 5-10-105, the provisions of § 12-12-313 govern the admissibility of the chemical analysis into evidence rather than the provisions of this section.

History. Acts 1957, No. 346, § 1; 1961, No. 215, § 1; 1969, No. 17, § 1; 1971, No. 578, § 1; 1983, No. 549, § 12; A.S.A. 1947, § 75-1031.1; Acts 1989, No. 928, § 1; 1999, No. 462, § 1; 2001, No. 561, §§ 11, 12; 2005, No. 886, § 2.

Publisher's Notes. As to methods of chemical analysis, see Publisher's Notes to § 5-65-204.

Amendments. The 2001 amendment rewrote (a) and (d).

The 2005 amendment, in (d)(1)(A), inserted "Except as provided in subsection (e) of this section" and "or her"; and added (e).

RESEARCH REFERENCES

ALR. Admissibility and sufficiency of extrapolation evidence in DUI prosecutions. 119 ALR 5th 379.

Ark. L. Rev. Legislation — No. 215 — Weight to Be Given Evidence of Alcoholic Content of the Blood Changed, 15 Ark. L. Rev. 437.

A Decade of Development in the Law of Criminal Procedure in Arkansas, 22 Ark. L. Rev. 669.

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

In general.
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In General.

This section is not a criminal statute but rather a statute relating to admission of evidence in criminal prosecutions. *Wilson v. Coston*, 239 Ark. 515, 390 S.W.2d 445 (1965).

Applicability.

It was error to apply this section to a civil proceeding for personal injuries arising out of automobile accident. *Wilson v. Coston*, 239 Ark. 515, 390 S.W.2d 445 (1965); but see *Judy v. McDaniel*, 247 Ark. 409, 445 S.W.2d 722 (1969); *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981).

Construction.

The "person calibrating the machine" is the person testing the accuracy of the machine's measurements as outlined in the regulations, or the senior operator.

Peters v. State, 321 Ark. 276, 902 S.W.2d 757 (1995).

Certificate.

This section does not require the state to produce in court the Arkansas Department of Health official who certifies the breathalyzer machine; it allows certification to be proven with the certificate itself. *Wells v. State*, 285 Ark. 9, 684 S.W.2d 248 (1985).

This section does not require proof of an installation certificate before test results may be admitted into evidence. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986).

Subsections (c) and (d) of this section require that (1) the method of testing must be approved by the Board of Health, (2) the machine must have been certified in the three months preceding arrest, and (3) the operator must have been trained and certified. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986).

Cross-Examination of Operator.

While subsection (d) does not require the State to introduce an installation certificate or a senior operator's testimony as a prerequisite to the introduction of chemical analysis test results, it does provide that the person who calibrates the machine and the person who operates it will be made available for cross-examination by the defense upon reasonable notice to the prosecutor. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986); *Smith v. State*, 301 Ark. 569, 785 S.W.2d 465 (1990).

If defendant had desired to cross-exam-

ine senior operator, he had the burden of notifying the prosecutor to make the operator available; he therefore could not complain of the State's failure to produce the senior operator or his certificate. *Johnson v. State*, 17 Ark. App. 82, 703 S.W.2d 475 (1986).

Admission of breathalyzer results was error where, prior to trial the defendant indicated that he wished to cross-examine all persons responsible for the calibration and certification of the breathalyzer, but the state failed to make such persons available at trial; further, such error was prejudicial, notwithstanding that the jury might have convicted the defendant of operating a motor vehicle while intoxicated based on the testimony of the arresting officer that the defendant had an odor of alcohol about him and failed two field-sobriety tests, without considering the improperly admitted testimony concerning the defendant's blood-alcohol content. *White v. State*, 73 Ark. App. 264, 42 S.W.3d 584 (2001).

Due Process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not require that law enforcement agencies preserve breath samples in order to introduce breath analysis tests at trial. *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

Evidence.

—In General.

Examination of investigating police officer relative to intoximeter test and amount of alcohol allegedly consumed by defendant was not error where defendant himself testified that he had consumed a certain quantity of alcohol and cross-examination of investigating officer elicited testimony that officer did not arrest defendant but would have if the meter reading had been high enough. *Judy v. McDaniel*, 247 Ark. 409, 445 S.W.2d 722 (1969).

Where there was testimony of witnesses that defendant acted drunk while in liquor store and further testimony of policeman that defendant was in wrong lane of traffic and weight of alcohol in defendant's blood was above amount for statutory presumption of intoxication it was not improper to overrule a motion for a directed verdict of acquittal. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

Expert testimony explaining the meaning of blood alcohol content is not required to prove intoxication. In fact, one may be convicted of driving while intoxicated without the use of a blood alcohol test. *Sparks v. State*, 25 Ark. App. 190, 756 S.W.2d 911 (1988).

Trial judge did not abuse his discretion in acquitting defendant where officer revealed that he did not know for certain what simulator he was using because the device used had lost its label, and was unable to testify that device had in fact been approved by the health department. *State v. Massery*, 302 Ark. 447, 790 S.W.2d 175 (1990).

State met proof required under Department of Health Regulation for Alcohol Blood Testing, § 3.20. *Gavin v. State*, 309 Ark. 158, 827 S.W.2d 161 (1992).

Although this section does not require a machine operator's testimony, or his certificate, as a prerequisite to the introduction of chemical analysis test results, § 5-65-204 requires a blood sample to be collected in keeping with certain Board of Health methods in order for the test to be admissible in evidence. *Caffey v. State*, 43 Ark. App. 160, 862 S.W.2d 293 (1993).

The crime of DWI is committed whether the act is violated by a motorist who is intoxicated or by a motorist whose blood alcohol level is in excess of the legal limit; these two conditions are two different ways of proving a single violation, and proof by chemical test that the motorist's blood alcohol content was in excess of the legal limit is admissible as evidence tending to prove intoxication. *Stephens v. State*, 320 Ark. 426, 898 S.W.2d 435 (1995).

Defendant's DWI conviction was improper where neither blood test resulted in blood alcohol levels in excess of the then legal limit, there was no testimony concerning speech pattern, appearance of defendant's eyes, any admission of his, or anything else that would support a finding of intoxication; in light of the fact that neither blood test resulted in blood alcohol levels in excess of the then legal limit, the court could not hold that defendant's case was one in which blood alcohol content and a mere allegation of an odor of intoxication was sufficient proof for DWI. *Porter v. State*, 82 Ark. App. 589, 120 S.W.3d 178 (2003).

Defendant was not entitled to a pre-

sumption that he was not intoxicated based on the test that showed his blood-alcohol content to be 0.05%; defendant failed to take into account the blood test that was drawn some 30 minutes after the wreck, which showed a blood-alcohol content of 0.0904 percent, and the trooper's testimony that defendant had been given fluids prior to the time that the second blood sample was drawn. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

—Portable Breath Test.

The portable breath test is not one certified by the Department of Health and is therefore not admissible under this section. *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).

The results of a portable breath test, or what is sometimes called a roadside sobriety test, which are not admissible to prove a person is guilty of driving while intoxicated, are admissible when they would indicate a person is not guilty where the evidence is exculpatory, is crucial to the defense, and is sufficiently reliable to warrant admission. *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988).

Since portable breathalyzer tests have not been certified by the Department of Health, admitting the evidence of the portable breathalyzer test was erroneous; however, the error was harmless. *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995).

Trial court erred in allowing the state to introduce evidence that defendant failed a portable breath test since the portable breathalyzer test had not been certified by the Arkansas Department of Health; a chemical analysis that has not been certified by the Department of Health is not admissible as evidence of driving while intoxicated under this section. *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003).

—Refusal to Take Chemical Test.

Evidence of the refusal to submit to a chemical test can properly be admitted as circumstantial evidence showing consciousness of guilt of a defendant charged with offense of driving while intoxicated, and once admitted, the weight of this evidence is a question to be resolved by the trier of fact, which may also consider the circumstances surrounding the refusal and any explanation given for de-

clining to take the test. *Spicer v. State*, 32 Ark. App. 209, 799 S.W.2d 562 (1990).

Method of Analysis.

—In General.

It was error to admit testimony as to a urine analysis where there was no evidence analysis had been made according to a method approved by director of State Board of Health or Director of State Police. *Jones v. Forrest City*, 239 Ark. 211, 388 S.W.2d 386 (1965), overruled on other grounds by *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983).

Trial court did not abuse its discretion in admitting results of breathalyzer test over objections of defendant that state failed to show officer who administered test was competent operator of the machine where officer briefly outlined operation of the machine, said that he had been to school to learn to operate it and that he had been operating it as part of his duties for a period of time. *Smith v. State*, 243 Ark. 12, 418 S.W.2d 627 (1967).

Where intoximeter was certified during period in which test of driver was made and there was a certified machine operator present at such test although he did not conduct the test, there was sufficient foundation for test findings under this section to admit them into evidence in action for property damages and personal injury. *Watson v. Frierson*, 272 Ark. 316, 613 S.W.2d 824 (1981).

Intoxilyzer satisfies the statutory requirement of being a "chemical analysis." *Dollar v. State*, 287 Ark. 153, 697 S.W.2d 93 (1985).

—Compliance with Rules.

Where there was evidence that there was substantial compliance with Department of Health rules in the taking of a blood test to determine alcoholic content such evidence was admissible. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

Even certified operators may not ignore the Department of Health regulations on operation and maintenance of the chromatograph, if their testimony is to form the basis of a presumption of intoxication. *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979).

Failure to calibrate machine as required by Department of Health regulation held not to be substantial compliance

with the rule, and the failure to abide by the regulation was prejudicial to the defendant. *Cossey v. State*, 267 Ark. 679, 590 S.W.2d 60 (Ct. App. 1979).

Where the defendant was collectively observed by officers for 30 minutes prior to administering of breath test, fact that he was not observed for 20 minutes by the operator of machine as required by Department of Health standards was of no consequence since substantial compliance with health department regulations is all that is required. *Sparrow v. State*, 284 Ark. 396, 683 S.W.2d 218 (1985).

—Time.

Although Department of Health rules required that the sample of blood to determine intoxication be collected within two hours of an alleged offense and the testimony showed that the blood was drawn more than three hours thereafter, where it was also shown that the longer one waits to run the blood test, the more the percentage of alcohol decreases, no prejudicial error was demonstrated. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

This section does not provide an unqualified exclusionary rule of evidence for tests administered more than two hours after a person is arrested for driving while intoxicated but does provide for a presumption where the test is administered within two hours of arrest and the blood alcohol content is within a certain percentage. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

This section is silent regarding situations in which breath test is taken two hours or more after the arrest, and the result reflects a blood alcohol content of 0.10% or more, for a delay beyond two hours could result in the blood alcohol content of an intoxicated person declining to the extent that it could no longer be detected by the testing mechanism, or, if

detected it would register a smaller level and in such cases it would not be fair to apply either of the statutory provisions on presumptions. However, if the delay is two hours or longer and the test still shows a blood alcohol content of 0.10% or more, neither provision on presumptions is applicable, and the test is admissible. *Elam v. State*, 286 Ark. 174, 690 S.W.2d 352 (1985).

Notice.

The language of subdivision (d)(2) of this section requires that a new notice be given following an appeal to circuit court and without such notice being filed the state is under no duty to produce the witness. *Bussey v. State*, 315 Ark. 292, 867 S.W.2d 433 (1993).

Cited: *Ayers v. State*, 247 Ark. 174, 444 S.W.2d 695 (1969); *Holloway v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976), rev'd on other grounds, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980); *Nicholas v. State*, 268 Ark. App. 541, 595 S.W.2d 237 (Ct. App. 1980); *Rasmussen v. State*, 277 Ark. 238, 641 S.W.2d 699 (1982); *Johnson v. State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982); *Ethridge v. State*, 9 Ark. App. 111, 654 S.W.2d 595 (1983); *Spicer v. City of Fayetteville*, 284 Ark. 315, 681 S.W.2d 369 (1984); *Southwest Pipe & Supply v. Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1984); *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985); *Weatherford v. State*, 286 Ark. 376, 692 S.W.2d 605 (1985); *Hughes v. State*, 17 Ark. App. 34, 702 S.W.2d 817 (1986); *Gullett v. State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986); *Ballew v. State*, 305 Ark. 542, 809 S.W.2d 374 (1991); *Greer v. State*, 310 Ark. 522, 837 S.W.2d 884 (1992); *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Smith v. State*, 55 Ark. App. 97, 931 S.W.2d 792 (1996).

5-65-207. Alcohol testing devices.

(a)(1) Any instrument used to determine the alcohol content of the breath for the purpose of determining if the person was operating a motor vehicle while intoxicated or with an alcohol concentration of eight-hundredths (0.08) or more shall be so constructed that the analysis is made automatically when a sample of the person's breath is placed in the instrument, and without any adjustment or other action of the person administering the analysis.

(2) The instrument shall be so constructed that the alcohol content is shown by visible digital display on the instrument and on an automatic readout.

(b) Any breath analysis made by or through the use of an instrument that does not conform to the requirements prescribed in this section is inadmissible in any criminal or civil proceeding.

(c)(1) The State Board of Health may adopt appropriate rules and regulations to carry out the intent and purposes of this section, and only instruments approved by the board as meeting the requirements of this section and regulations of the board shall be used for making the breath analysis for determining alcohol concentration.

(2)(A) The Division of Health of the Department of Health and Human Services specifically may limit by its rules the types or models of testing devices that may be approved for use in Arkansas for the purposes set forth in this section.

(B) The approved types or models shall be specified by manufacturer's name and model.

(d) Any law enforcement agency that conducts alcohol testing shall be in full compliance with the provisions of this section by June 28, 1989.

History. Acts 1985, No. 533, §§ 1-3; A.S.A. 1947, §§ 75-1046.1 — 75-1046.3; Acts 1989, No. 419, § 1; 2001, No. 561, § 13.

Amendments. The 2001 amendment redesignated former (a) as present (a)(1) through (a)(2) and made related changes; in (a)(1), deleted "machine or" preceding "instrument" and "or blood of any person by analysis of the breath of the person" preceding "for the purpose of" and substituted "an alcohol concentration of eight-

hundredths (0.08)" for "a blood alcohol content of one-tenth of one percent (0.10%); substituted "instrument" for "machine" in (a)(2); deleted "blood" preceding "alcohol" in (a)(2), (c)(1) and (d); substituted "an instrument" for "a machine or instrument" in (b); redesignated former (c) as present (c)(1) through (c)(2); in (c)(1), deleted "machines or" preceding "instruments" and substituted "concentration" for "content"; and made minor stylistic changes throughout.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

Full Compliance.

The legislature intended to provide a time lag between the effective date of the act (June 28, 1985) enacting this section and full compliance. Hence, introduction of breathalyzer test into evidence was proper even though machine did not have

the visual digital readout required by this section, since full compliance with this section by all law enforcement agencies which conduct blood alcohol testing is not required until June 28, 1989. *Cothran v. State*, 291 Ark. 401, 725 S.W.2d 548 (1987).

5-65-208. Collisions — Testing required.

(a) When the driver of a motor vehicle is involved in an accident resulting in loss of human life or when there is reason to believe death may result, and there exists probable cause to believe that the driver is guilty of a violation of the state's law prohibiting driving while under the influence, in addition to a penalty established elsewhere under state law, a chemical test of the driver's blood, breath, or urine shall be administered to the driver, even if fatally injured, to determine the presence of and percentage of concentration of alcohol or drugs, or both, in the driver's body.

(b)(1) The police officer who responds to the collision, the physician in attendance, or any other person designated by state law who was present when the death occurred, shall order the chemical test as soon as practicable.

(2)(A) The medical personnel who conducted the chemical test under subsection (a) of this section of the driver's blood, breath, or urine shall forward the results of the chemical test to the Department of Arkansas State Police, and the department shall establish and maintain the results of the analyses required by subsection (a) of this section in a database.

(B) The information in the database shall reflect the number of fatal motor vehicle accidents in which:

(i) Alcohol was found to be a factor, with the percentage of alcohol concentration involved;

(ii) Drugs were found to be a factor, listing the class of drugs so found and their amounts; and

(iii) Both alcohol and drugs were found to be factors, with the percentage of alcohol concentration involved, and listing the class of drugs so found and their amounts.

(c) The results of the analyses required by this section shall be reported to the department and may be used by state and local officials only for statistical purposes that do not reveal the identity of the deceased person.

History. Acts 1995, No. 711, § 2; 1995, No. 1105, § 2; 2003, No. 950, § 1.

A.C.R.C. Notes. References to "this subchapter" in §§ 5-65-201 — 5-65-207 may not apply to this section which was enacted subsequently.

References to "this chapter" in subchapters 1 and 2 may not apply to this section which was enacted subsequently.

Amendments. The 2003 amendment, in (a), substituted "or urine shall" for "or urine must," "even if fatally injured" for "including those fatally injured" and "drugs, or both in the person's body" for "drugs in such person's body."

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal

Law, Driving While Intoxicated, 26 UALR L.J. 367.

SUBCHAPTER 3 — UNDERAGE DRIVING UNDER THE INFLUENCE LAW

SECTION.

- 5-65-301. Title.
- 5-65-302. Definitions.
- 5-65-303. Conduct proscribed.
- 5-65-304. Seizure, suspension, and revocation of license — Temporary permits.
- 5-65-305. Fines.
- 5-65-306. Public service work.

SECTION.

- 5-65-307. Alcohol and driving education program.
- 5-65-308. No probation prior to adjudication of guilt.
- 5-65-309. Implied consent.
- 5-65-310. Refusal to submit.
- 5-65-311. Relationship to other laws.

A.C.R.C. Notes. References to “this chapter” in subchapters 1 and 2 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1995 (1st Ex. Sess.), No. 13, § 13: Oct. 23, 1995. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state; and it is further determined that the current method of financing the state judicial system has become so complex as to make the administration of the system impossible, and the lack of reliable data on the current costs of the state judicial system prohibits any comprehensive change in the funding of the system at this time. Therefore, an emergency is declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

Acts 2003, No. 1462, § 4: July 1, 2003. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that if the fees that are raised by this bill do not become effective by July 1, 2003, there will be a shortfall in the funding needed to maintain the alcoholism education programs; that these programs are mandated by law for those individuals that have their li-

cense suspended or revoked following an arrest for driving while intoxicated; and that these programs provide educational instruction and are necessary to protect the public health and welfare. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003.”

Acts 2005, No. 1992, § 6: Apr. 11, 2005. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that currently there exists some confusion as to whether the fees collected for the reinstatement of a suspended or revoked driver’s license should be collected for each offense or for each reinstatement; that due to the confusion, state agencies have not been allowed to collect the revenue that they anticipated for reinstatement fees which is causing a negative fiscal impact; and that this act is immediately necessary to clarify the law to prevent the impairment of agency operations due to a loss of anticipated revenue. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

5-65-301. Title.

This subchapter may be known and cited as the “Underage Driving Under the Influence Law” or the “Underage DUI Law”.

History. Acts 1993, No. 863, § 1.

CASE NOTES

Cited: Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-302. Definitions.

As used in this subchapter:

(1) “Influence” means being controlled or affected by the ingestion of an alcoholic beverage or similar intoxicant, or any combination of an alcoholic beverage or similar intoxicant, to such a degree that the driver’s reactions, motor skills, and judgment are altered or diminished, even to the slightest scale, and the underage driver, therefore, due to inexperience and lack of skill, constitutes a danger of physical injury or death to himself or herself and other motorists or pedestrians; and

(2) “Underage” means any person who is under twenty-one (21) years of age and therefore may not legally consume alcoholic beverages in Arkansas.

History. Acts 1993, No. 863, § 2.

5-65-303. Conduct proscribed.

(a) It is unlawful and punishable as provided in this subchapter for any underage person to operate or be in actual physical control of a motor vehicle while under the influence of an alcoholic beverage or similar intoxicant.

(b) It is unlawful and punishable as provided in this subchapter for any underage person to operate or be in actual physical control of a motor vehicle if at that time there was an alcohol concentration of two-hundredths (0.02) but less than eight-hundredths (0.08) in the underage person’s breath or blood as determined by a chemical test of the underage person’s blood or breath or other bodily substance.

History. Acts 1993, No. 863, § 3; 2001, No. 561, § 14.

Amendments. The 2001 amendment substituted “an alcohol concentration ...

persons breath or” for “one-fiftieth of one percent (0.02%) but less than one-tenth of one percent (0.10%) by weight of alcohol in the person’s” in (b).

RESEARCH REFERENCES

ALR. Validity, construction, and operation of school “zero tolerance” policies towards drugs, alcohol, or violence. 117 ALR 5th 459.

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

Evidence.
Indictment or information.
Lesser-included offenses.
Sentencing.

Evidence.

Where defendant was driving erratically, the police officer detected an odor of alcoholic beverages in defendant's car, defendant failed at least one field sobriety test and tested at 0.07% blood/alcohol a little more than an hour after his arrest, and there was no opportunity for him to consume alcoholic beverages between time of arrest and time of testing, the total circumstances were enough to support a judgment of conviction for driving a car while under the influence of an alcoholic beverage. *Drummond v. State*, 320 Ark. 385, 897 S.W.2d 553 (1995).

Indictment or Information.

Municipal court erred and prejudiced defendant charged with driving while intoxicated (DWI) when it changed the charge to driving under the influence

(DUI) on its own motion, because DUI is not a lesser-included offense of DWI and altering the charge violated § 5-65-107; and the circuit court erred in trying and convicting defendant of DUI following his appeal from the municipal court, a judgment it was not authorized to render under § 16-19-1105. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997).

Lesser-Included Offenses.

Driving under the influence (DUI) is not a lesser-included offense of driving while intoxicated, in that DUI requires an additional element of proof of the defendant's age and a different level of intoxication. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997).

Sentencing.

Jail sentence for violating this section was illegal on its face because the trial court lacked authority to impose it. *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

Cited: *State v. Roberts*, 321 Ark. 31, 900 S.W.2d 175 (1995).

5-65-304. Seizure, suspension, and revocation of license — Temporary permits.

(a) At the time of arrest for violating § 5-65-303, the arresting law enforcement officer shall seize the motor vehicle operator's license of the underage person arrested and issue to the underage person a temporary driving permit as provided by § 5-65-402.

(b)(1) The Office of Driver Services shall suspend or revoke the driving privileges of the arrested underage person under the provisions of § 5-65-402 and the arrested underage person shall have the same right to hearing and judicial review as provided under § 5-65-402.

(2) The suspension or revocation shall be as follows:

(A) Suspension for ninety (90) days for the first offense of violating § 5-65-303;

(B) Suspension for one (1) year for the second offense of violating § 5-65-303; and

(C)(i) Revocation for the third or subsequent offense of violating § 5-65-303 occurring while the person is underage.

(ii) Revocation is until the underage person reaches twenty-one (21) years of age or for a period of three (3) years, whichever is longer.

(c) In order to determine the number of previous offenses to consider when suspending or revoking the arrested underage person's driving privileges, the office shall consider as a previous offense:

(1) Any conviction that occurred prior to July 1, 1996, for the offenses of:

(A) Operating or being in actual physical control of a motor vehicle while intoxicated or in violation of § 5-65-103; or

(B) Refusing to submit to a chemical test;

(2) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-103 or violation of § 5-65-205(a) occurring on or after July 1, 1996, when the person was subsequently convicted of the criminal charges;

(3) Any conviction for violating § 5-65-303 or § 5-65-310 prior to July 30, 1999; and

(4) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-303 or § 5-65-310 occurring on or after July 30, 1999, when the person was subsequently convicted of the criminal charge.

(d)(1)(A)(i) The office shall charge a fee to be calculated as provided under subdivision (d)(2)(B) of this section for reinstating a driver's license suspended because of a violation of § 5-65-303 or § 5-65-310.

(ii) Forty percent (40%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Blood Alcohol Program of the Division of Health of the Department of Health and Human Services.

(B) The reinstatement fee is calculated by multiplying twenty-five dollars (\$25.00) by each separate occurrence of an offenses resulting in an administrative suspension order under § 5-65-303 unless the administrative suspension order has been removed because:

(i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) A de novo review of the administrative suspension order by the office results in the removal.

(C) The fee under this section is supplemental to and in addition to any fee imposed under § 5-65-119, § 5-65-310, § 27-16-508, or § 27-16-808.

(2) As used in this subsection, "occurrence" means each separate calendar date when an offense or offenses take place.

History. Acts 1993, No. 863, § 4; 1999, No. 1077, § 16; 2005, No. 1992, § 2.

Amendments. The 2005 amendment inserted the subdivision (1)(A) designation in (d); substituted "to be calculated as

provided under subdivision (d)(2) of this section" for "of twenty-five dollars (\$25.00)" in present (d)(1)(A); redesignated former (d)(2) as present (d)(1)(B); and added (d)(2).

CASE NOTES

Cited: Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-305. Fines.

(a) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-303 or § 5-65-310 shall be fined:

(1) No less than one hundred dollars (\$100) and not more than five hundred dollars (\$500) for the first offense;

(2) No less than two hundred dollars (\$200) and not more than one thousand dollars (\$1,000) for the second offense occurring underage; and

(3) No less than five hundred dollars (\$500) and not more than two thousand dollars (\$2,000) for the third or subsequent offense occurring underage.

(b) For the purpose of determining an underage person's fine under this subchapter, an underage person who has one (1) or more previous convictions or suspensions for a violation of § 5-65-103 or § 5-65-205 is deemed to have a conviction for a violation of this subchapter for each conviction for driving while intoxicated.

History. Acts 1993, No. 863, § 5; 1999, No. 1077, § 17.

CASE NOTES

Cited: Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-306. Public service work.

(a) Any underage person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-303 or § 5-65-310 shall be ordered by the court to perform public service work of the type and for the duration as deemed appropriate by the court.

(b) The period of community service shall be for:

(1) No less than thirty (30) days for a second offense of violating § 5-65-303; and

(2) No less than sixty (60) days for a third or subsequent offense of violating § 5-65-303.

History. Acts 1993, No. 863, § 6; 1999, No. 1077, § 18.

CASE NOTES**Constitutionality.**

The appellate court did not consider the constitutionality of the public service penalty in this section because the appellate court will not strike down a legislative act on constitutional grounds without first

having the benefit of a fully developed adversary case. Drummond v. State, 320 Ark. 385, 897 S.W.2d 553 (1995).

Cited: Roberts v. State, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-307. Alcohol and driving education program.

(a)(1)(A) Any underage person who has his or her driving priv

ileges suspended, revoked, or denied for violating § 5-65-303 is required to complete an alcohol and driving education program for underage drivers as prescribed and approved by the Bureau of Alcohol and Drug Abuse Prevention of the Division of Health of the Department of Health and Human Services or an alcoholism treatment program, or both, in addition to any other penalty provided in this subchapter.

(B) If during the period of suspension or revocation in subdivision (a)(1)(A) of this section the underage person commits an additional violation of § 5-65-303, the underage person is also required to complete an approved alcohol and driving education program or alcoholism treatment program for each additional violation.

(2) The bureau shall approve only those programs in alcohol and driving education that are targeted at the underage driving group and are intended to intervene and prevent repeat occurrences of driving under the influence or driving while intoxicated.

(3)(A)(i) The alcohol and driving education program may collect a program fee of up to one hundred twenty-five dollars (\$125) per enrollee to offset program costs.

(ii) An underage person ordered to complete an alcohol and driving education program or an alcoholism treatment program under this section may be required to pay, in addition to the costs collected for the program, a fee of up to twenty-five dollars (\$25.00) to offset the additional costs associated with reporting requirements under this subchapter.

(B) An approved alcohol and driving education program shall report semiannually to the bureau all revenue derived from these fees.

(b) Prior to reinstatement of a driver's license suspended or revoked under this subchapter, the driver shall furnish proof of attendance at and completion of the alcohol and driving education program or alcoholism treatment program required under subdivision (a)(1) of this section.

(c) The bureau may promulgate rules and regulations reasonably necessary to carry out the purposes of this section regarding the approval and monitoring of the alcohol and driving education programs.

(d)(1)(A) A person whose license is suspended or revoked for violating § 5-65-303 or § 5-65-310 shall:

(i) Both:

(a) Furnish proof of attendance at and completion of the alcohol and driving education program or alcoholism treatment program required under subdivision (a)(1) of this section before reinstatement of his or her suspended or revoked driver's license; and

(b) Pay any fee for reinstatement required under § 5-65-119 or § 5-65-304; or

(ii) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(B) An application for reinstatement shall be made to the Office of Driver Services.

(2) Even if a person has filed a de novo petition for review pursuant to § 5-65-402, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(3)(A) A person suspended under this subchapter may enroll in an alcohol education program prior to disposition of the offense by the circuit court, district court, or city court, but is not entitled to any refund of fees paid if the charges are dismissed or if the person is acquitted of the charges.

(B) A person who enrolls in an alcohol education program is not entitled to any refund of fees paid if the person is subsequently acquitted.

(e) Any alcohol and driving education program or alcoholism treatment program shall remit the fees imposed under this section to the bureau.

History. Acts 1993, No. 863, § 7; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1999, No. 1077, § 19; 2003, No. 1462, § 3; 2005, No. 1768, § 4.

Amendments. The 2003 amendment inserted “or an alcoholism treatment program, or both” in (a)(1); substituted “seventy-five (\$75.00)” for “fifty dollars (\$50.00)” in present (a)(3)(A)(i); and inserted “or an alcoholism treatment program” in present (a)(3)(A)(ii).

The 2005 amendment redesignated former (a)(1) as present (a)(1)(A); substituted

“Bureau ... Human Services” for “Highway Safety Program” in present (a)(1)(A); substituted “bureau” for “Highway Safety Program” in (a)(2), (a)(3)(B) and (c); added (a)(1)(B); substituted “one hundred twenty-five dollars (\$125)” for “seventy-five dollars (\$75.00)” in (a)(3)(A)(i); added “or programs required under subdivision (a)(1) of this section” in (b) and (d)(1)(A)(i)(a); substituted “circuit, district, or city court” for “municipal or circuit court” in (d)(3)(A); and added (e).

CASE NOTES

Cited: *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-308. No probation prior to adjudication of guilt.

(a)(1) Section 16-93-301 et seq. allows a circuit court judge, district court judge, or city court judge to place on probation a first offender who plead guilty or nolo contendere prior to an adjudication of guilt, and upon successful completion of probation, the circuit court judge, district court judge, or city court judge may discharge the accused without a court adjudication of guilt and expunge the record.

(2)(A) No circuit court judge, district court judge, or city court judge may utilize the provisions of § 16-93-301 et seq. in an instance in which an underage person is charged with violating § 5-65-303.

(B) Notwithstanding the provisions of § 5-4-301, § 5-4-322, or subdivision (a)(2)(A) of this section, in addition to the mandatory penalties required for a violation of § 5-65-303 a circuit court judge, district court judge, or city court judge may utilize probationary supervision solely for the purpose of monitoring compliance with his

or her orders and require an offender to pay a reasonable fee in an amount to be established by the circuit court judge, district court judge, or city court judge.

(b) Any magistrate or judge of a court shall keep or cause to be kept a record of any violation of this subchapter presented to that court and shall keep a record of any official action by that court in reference to the violation of this subchapter, including, but not limited to, a record of any finding of guilt, plea of guilty or nolo contendere, or judgment of acquittal, and the amount of fine and other sentence.

(c) Within thirty (30) days after sentencing a person who has been found guilty or pleaded guilty or nolo contendere on a charge of violating any provision of this subchapter, any magistrate of the court or clerk of the court shall prepare and immediately forward to the Office of Driver Services an abstract of the record of the court covering the case in which the person was found guilty or pleaded guilty or nolo contendere, and the abstract shall be certified by the person so required to prepare it to be true and correct.

(d) The abstract shall be made upon a form furnished by the office and shall include:

- (1) The name and address of the party charged;
- (2) The number, if any, of the driver's license of the party charged;
- (3) The registration number of the vehicle involved;
- (4) The date of hearing;
- (5) The plea;
- (6) The judgment; and
- (7) The amount of the fine and other sentence, as the case may be.

History. Acts 1993, No. 863, § 8; 2005, No. 1768, § 5.

Amendments. The 2005 amendment substituted "circuit, district, and city courts" for "circuit and municipal courts"

in (a)(1); redesignated former (a)(2) as present (a)(2)(A); substituted "circuit, district, or city judge" for "circuit or municipal judge" in present (a)(2)(A); and added (a)(2)(B).

5-65-309. Implied consent.

(a) Any underage person who operates a motor vehicle or is in actual physical control of a motor vehicle in this state is deemed to have given consent, subject to the provisions of § 5-65-203, to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood if:

(1) The underage person is arrested for any offense arising out of an act alleged to have been committed while the underage person was driving while under the influence or driving while there was an alcohol concentration of two-hundredths (0.02) but less than eight-hundredths (0.08) in his or her breath or blood;

(2) The underage person is involved in an accident while operating or in actual physical control of a motor vehicle; or

(3) The underage person is stopped by a law enforcement officer who has reasonable cause to believe that the underage person, while operating or in actual physical control of a motor vehicle, is under the

influence or has an alcohol concentration of two-hundredths (0.02) but less than eight-hundredths (0.08) in his or her breath or blood.

(b) Any underage person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to the provisions of § 5-65-203.

History. Acts 1993, No. 863, § 9; 2001, No. 561, § 15.

Amendments. The 2001 amendment inserted "breath or" in the introductory language in (a) and (a)(3); substituted "an alcohol concentration ... or her breath or" for "one-fiftieth of one percent (0.02%) but

less than one-tenth of one percent (0.10%) of alcohol in the person's" in (a)(1); and substituted "an alcohol concentration ... eight-hundredths (0.08)" for "one-fiftieth of one percent (0.02%) but less than one-tenth of one percent (0.10%) of alcohol" in (a)(3).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

Cited: *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

5-65-310. Refusal to submit.

(a) If an underage person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, as provided in § 5-65-309, no chemical test shall be given, and the underage person's driver's license shall be seized by the law enforcement officer and the law enforcement officer shall immediately deliver to the underage person from whom the driver's license was seized a temporary driving permit as provided by § 5-65-402.

(b)(1) The Office of Driver Services shall suspend or revoke the driving privileges of the arrested underage person under § 5-65-402.

(2) The office shall suspend the underage person's driving privileges as follows:

(A) Suspension for ninety (90) days for a first offense under this section;

(B) Suspension for one (1) year for a second offense under this section; and

(C)(i) Revocation for the third or subsequent offense occurring while the person is underage.

(ii) Revocation is until the underage person reaches twenty-one (21) years of age or for a period of three (3) years, whichever is longer.

(c) In order to determine the number of previous offenses to consider when suspending or revoking the arrested underage person's driving privileges, the office shall consider as a previous offense:

(1) Any conviction for an offense that occurred prior to July 1, 1996, of:

(A) Operating or being in actual physical control of a motor vehicle while intoxicated or in violation of § 5-65-103; or

(B) Refusing to submit to a chemical test;

(2) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-103 or violation of § 5-65-205 occurring on or after July 1, 1996, when the person was subsequently convicted of the criminal charge;

(3) Any conviction for violating § 5-65-303 or § 5-65-310 prior to July 30, 1999; and

(4) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-303 or § 5-65-310 occurring on or after July 30, 1999, when the person was subsequently convicted of the criminal charge.

(d) In addition to any other penalty provided for in this section, if the underage person is a resident without a license or permit to operate a motor vehicle in this state:

(1) The office shall deny to that underage person the issuance of a license or permit for a period of six (6) months for a first offense; and

(2) For a second or subsequent offense by an underage resident without a license or permit to operate a motor vehicle, the office shall deny to that underage person the issuance of a license or permit for a period of one (1) year.

(e) When an underage nonresident's privilege to operate a motor vehicle in this state has been suspended, the office shall notify the office of issuance of that underage person's nonresident motor vehicle license of action taken by the office.

(f)(1)(A) The office charge a reinstatement fee to be calculated as provided under subdivision (f)(1)(B) of this section for reinstating a driver's license suspended or revoked for a violation of this section.

(B) The reinstatement fee is calculated by multiplying twenty-five dollars (\$25.00) by the number of offenses resulting in an administrative suspension order under § 5-65-310 unless the administrative suspension order has been removed because:

(i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) The office has entered an administrative suspension order.

(C) The fee under subdivision (f)(1)(A) of this section is supplemental to and in addition to any fee imposed by § 5-65-119, § 5-65-304, § 27-16-508, or § 27-16-808.

(2) Forty percent (40%) of the revenues derived from the reinstatement fee under this subsection shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Blood Alcohol Program of the Division of Health of the Department of Health and Human Services.

History. Acts 1993, No. 863, § 10; 1999, No. 1077, § 20; 2005, No. 1992, § 5.

Amendments. The 2005 amendment inserted the subdivision (1)(A) designation in (f); in present (f)(1)(A), substituted “reinstatement fee to be calculated as pro-

vided under this subdivision (f)(1)(A)” for “fee of of twenty-five dollars (\$25.00)”; added (f)(1)(B) and (f)(1)(C); and, in (f)(2), substituted “the reinstatement fee under this subsection (f)” for “this fee.”

CASE NOTES

ANALYSIS

Constitutionality.

—Standing.

Constitutionality.

—Standing.

Where testimony at trial established

that defendant voluntarily submitted to a breathalyzer test, there was no finding that he violated this section, thus, defendant lacked standing to warrant consideration of this section’s constitutionality on appeal. *Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995).

5-65-311. Relationship to other laws.

(a) A penalty prescribed in this subchapter for underage driving under the influence is in addition to any other penalty prescribed by law for the offense under another law of the State of Arkansas.

(b) For the purposes of this subchapter, there is no presumption, as there is found in § 5-65-206, that an underage person is not under the influence of an intoxicating substance, such as alcohol or a similar intoxicant, if the underage person’s alcohol concentration is four hundredths (0.04) or less.

(c) The following are the same for a chemical test or instrument used for testing breath or blood alcohol concentration under the Omnibus DWI Act, § 5-65-101 et seq:

- (1) The administration of a chemical test for breath or blood alcohol;
- (2) The instrument used to administer the chemical test;
- (3) The procedure used to calibrate and maintain the instrument; and
- (4) The use of the chemical test results as evidence.

(d) If there is evidence of an alcohol concentration of more than four-hundredths (0.04) but less than eight-hundredths (0.08) in an underage person’s blood, breath, or other bodily substance, this fact does not preclude the underage person from being prosecuted for driving while intoxicated under the Omnibus DWI Act, § 5-65-101 et seq.

History. Acts 1993, No. 863, § 11; 2001, No. 561, § 16.

Amendments. The 2001 amendment substituted “four hundredths (0.04) of one percent” for “five hundredths (0.05) of one percent” in (b); in (c), inserted “breath or” and deleted “machines and” preceding “in-

struments” and “and machines” preceding “and instruments”; and substituted “an alcohol concentration ... eight-hundredths (0.08)” for “more than one-twentieth of one percent (0.05%) but less than one-tenth of one percent (0.10%) by weight of alcohol” in (d).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

CASE NOTES

Cited: Roberts v. State, 324 Ark. 68,
919 S.W.2d 192 (1996).

SUBCHAPTER 4 — ADMINISTRATIVE DRIVER’S LICENSE SUSPENSION

SECTION.	SECTION.
5-65-401. Definitions.	5-65-403. Notice and receipt from arrest- ing officer.
5-65-402. Surrender of license or permit to arresting officer.	

Cross References. Seizure, suspen- rary permits — Ignition interlock re-
sion, and revocation of license — Tempo- stricted license, § 5-65-104.

5-65-401. Definitions.

- As used in this subchapter:
- (1) “Disqualification” means a prohibition against driving a commercial motor vehicle;
 - (2) “Immobilization” means revocation or suspension of the registration or license plate of a motor vehicle; and
 - (3) “Sworn report” means a signed and written statement of a certified law enforcement officer, under penalty of perjury, on a form provided by the Director of the Department of Finance and Administration.

History. Acts 1999, No. 1077, § 21.

5-65-402. Surrender of license or permit to arresting officer.

- (a)(1)(A) At the time of arrest for violating § 3-3-203(a), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5), the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer.
- (B) The arresting law enforcement officer shall seize the license, permit, or other evidence of driving privilege surrendered by the arrested person or found on the arrested person during a search.
- (2)(A)(i) If the license, permit, or other evidence of driving privilege seized by the arresting law enforcement officer has not expired and otherwise appears valid to the arresting law enforcement officer, the arresting law enforcement officer shall issue to the arrested person a

dated receipt for that license, permit, or other evidence of driving privilege on a form prescribed by the Office of Driver Services.

(ii) This receipt shall be recognized as a license and authorizes the arrested person to operate a motor vehicle for a period not to exceed thirty (30) days.

(B)(i) The receipt form shall contain and shall constitute a notice of suspension, disqualification, or revocation of driving privileges by the office, effective in thirty (30) days, notice of the right to a hearing within twenty (20) days, and if a hearing is to be requested, as notice that the hearing request is required to be made within seven (7) calendar days of the notice being given.

(ii) The receipt shall also contain phone numbers and the address of the office and inform the driver of the procedure for requesting a hearing.

(C) If the office is unable to conduct a hearing within the twenty-day period, a temporary permit shall be issued and is valid until the date of the hearing.

(D)(i) The seized license, permit, or other evidence of driving privilege and a copy of the receipt form issued to the arrested person shall be attached to the sworn report of the arresting law enforcement officer and shall be submitted by mail or in person to the office or its designated representative within seven (7) days of the issuance of the receipt.

(ii) The failure of the arresting law enforcement officer to timely file the sworn report does not affect the authority of the office to suspend, disqualify, or revoke the driving privilege of the arrested person.

(3)(A) Any notice from the office required under this subchapter that is not personally delivered shall be sent by certified mail and is deemed to have been delivered on the date when postmarked and shall be sent to the last known address on file with the office.

(B) Refusal of the addressee to accept delivery or attempted delivery of the notice at the address obtained by the arresting law enforcement officer or on file with the office does not constitute nonreceipt of notice.

(C) For any notice that is personally delivered, the person shall be asked to sign a receipt acknowledging he or she received the required notice.

(4)(A) The office or its designated official shall suspend, revoke, or disqualify the driving privilege of an arrested person or any nonresident driving privilege of an arrested person when it receives a sworn report from the arresting law enforcement officer that he or she had reasonable grounds to believe the arrested person:

(i) Was under twenty-one (21) years of age and purchased or was in possession of intoxicating liquor, wine, or beer in violation of § 3-3-203(a); or

(ii) Had been operating or was in actual physical control of a motor vehicle in violation of § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) and the sworn report is accompanied by:

(a) A written chemical test report or a sworn report that the arrested person was operating or in actual physical control of a motor vehicle in violation of § 5-65-103, § 5-65-303, or § 27-23-114; or

(b) A sworn report that the arrested person refused to submit to a chemical test of blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of the arrested person's blood in violation of § 5-65-205, § 5-65-310, or § 27-23-114(a)(5).

(B) The suspension, disqualification, or revocation shall be based as follows:

(i) The driving privileges of any person violating § 5-65-103 shall be suspended or revoked as provided by § 5-65-104;

(ii) The driving privileges of any person violating § 5-65-205(a) shall be suspended or revoked as provided by § 5-65-205(b);

(iii) The driving privileges of any person violating § 5-65-303 shall be suspended or revoked as provided by § 5-65-304(b);

(iv) The driving privileges of any person violating § 5-65-310(a) shall be suspended or revoked as provided by § 5-65-310(b);

(v) The driving privileges of any person violating § 27-23-114(a)(1) or § 27-23-114(a)(2) shall be disqualified as provided by § 27-23-112;

(vi) The driving privileges of any person violating § 27-23-114(a)(5) shall be disqualified as provided by § 27-23-112; and

(vii) The driving privileges of any person violating § 3-3-203(a) shall be suspended, revoked, or disqualified as provided by § 3-3-203(c).

(5) In addition to any other penalty provided for in this section, if the arrested person is a resident without a license or permit to operate a motor vehicle in this state:

(A) The office shall deny to that arrested person the issuance of a license or permit for a period of six (6) months for a first offense; and

(B) For a second or subsequent offense by a resident without a license or permit to operate a motor vehicle, the office shall deny to that arrested person the issuance of a license or permit for a period of one (1) year.

(6)(A)(i) If the arrested person is a nonresident, the arrested person's privilege to operate a motor vehicle in Arkansas shall be suspended in the same manner as that of a resident.

(ii) The office shall notify the office that issued the nonresident's motor vehicle license of the action taken by the office.

(B) When the arrested person is a nonresident without a license or permit to operate a motor vehicle, the office shall notify the office of issuance for that arrested person's state of residence of action taken by the office.

(7)(A) Upon the written request of a person whose privilege to drive has been revoked, denied, disqualified, or suspended, or who has received a notice of revocation, suspension, disqualification, or denial by the arresting law enforcement officer, the office shall grant the person an opportunity to be heard if the request is received by the office within seven (7) calendar days after the notice of the revocation,

suspension, disqualification, or denial is given in accordance with this section or as otherwise provided in this chapter.

(B) A request described in subdivision (a)(7)(A) of this section does not operate to stay the revocation, suspension, disqualification, or denial by the office until the disposition of the hearing.

(8)(A) The hearing shall be before the office or its authorized agent, in the office of the Revenue Division of the Department of Finance and Administration nearest the county where the alleged event occurred for which the person was arrested, unless the office or its authorized agent and the arrested person agree otherwise to the hearing's being held in some other county or that the office or its authorized agent may schedule the hearing or any part of the hearing by telephone and conduct the hearing by telephone conference call.

(B) The hearing shall not be recorded.

(C) At the hearing, the burden of proof is on the state and the decision shall be based on a preponderance of the evidence.

(D) The scope of the hearing shall cover the issues of whether the arresting law enforcement officer had reasonable grounds to believe that the person:

(i) Had been operating or was in actual physical control of a motor vehicle or commercial motor vehicle while:

(a) Intoxicated or impaired;

(b) The arrested person's blood alcohol concentration measured by weight of alcohol in the arrested person's blood was equal to or greater than the blood alcohol concentration prohibited by § 5-65-103(b);

(c) The blood alcohol concentration of a person under twenty-one (21) years of age was equal to or greater than the blood alcohol concentration prohibited by § 5-65-303; or

(d) The arrested person's blood alcohol concentration measured by weight of alcohol in the arrested person's blood was equal to or greater than the blood alcohol concentration prohibited by § 27-23-114;

(ii) Refused to submit to a chemical test of the blood, breath, or urine for the purpose of determining the alcohol or controlled substance contents of the arrested person's blood and whether the person was placed under arrest; or

(iii) Was under twenty-one (21) years of age and purchased or was in possession of any intoxicating liquor, wine, or beer.

(E)(i) The office or its agent at the hearing shall consider any document submitted to the office by the arresting law enforcement agency, document submitted by the arrested person, and the statement of the arrested person.

(ii) The office shall not have the power to compel the production of documents or the attendance of witnesses.

(F)(i) If the revocation, suspension, disqualification, or denial is based upon a chemical test result indicating that the arrested person was intoxicated or impaired and a sworn report from the arresting

law enforcement officer, the scope of the hearing shall also cover the issues as to whether:

(a) The arrested person was advised that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the chemical test result reflected an alcohol concentration equal to or in excess of the amount by weight of blood provided by law or the presence of other intoxicating substances;

(b) The breath, blood, or urine specimen was obtained from the arrested person within the established and certified criteria of the Division of Health of the Department of Health and Human Services;

(c) The chemical testing procedure used was in accordance with existing rules; and

(d) The chemical test result in fact reflects an alcohol concentration, the presence of other intoxicating substances, or a combination of alcohol concentration or other intoxicating substance.

(ii) If the revocation, suspension, disqualification, or denial is based upon the refusal of the arrested person to submit to a chemical test as provided in § 5-65-205, § 5-65-310, or § 27-23-114(a)(5), reflected in a sworn report by the arresting law enforcement officer, the scope of the hearing shall also include whether:

(a) The arrested person refused to submit to the chemical test; and

(b) The arrested person was informed that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the arrested person refused to submit to the chemical test.

(b) After the hearing, the office or its authorized agent shall order the revocation, suspension, disqualification, or denial to be rescinded or sustained and shall then advise any person whose license is revoked, suspended, or denied that he or she may request a restricted permit as otherwise provided for by this chapter.

(c)(1)(A) A person adversely affected by the hearing disposition order of the office or its authorized agent may file a de novo petition for review within thirty (30) days in the circuit court in the county where the offense took place.

(B) A copy of the decision of the office shall be attached to the petition.

(2)(A) The filing of a petition for review does not stay or place in abeyance the decision of the office or its authorized agent.

(B) If the circuit court issues an order staying the decision or placing the decision in abeyance, the circuit court shall transmit a copy of the order to the office in the same manner that convictions and orders relating to driving records are sent to that office.

(C)(i) The circuit court shall hold a final hearing on the de novo review within one hundred twenty (120) days after the date that the order staying the decision or placing the decision in abeyance is entered.

(ii) The circuit court may conduct the final hearing by telephone conference with the consent of the parties.

(3) An administrative hearing held pursuant to this section is exempt from the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(4)(A) On review, the circuit court shall hear the case de novo in order to determine based on a preponderance of the evidence whether a ground exist for revocation, suspension, disqualification, or denial of the person's privilege to drive.

(B) If the results of a chemical test of blood, breath, or urine are used as evidence in the suspension, revocation, or disqualification of the person's privilege to drive, then the provisions of § 5-65-206 shall apply in the circuit court proceeding.

(d)(1) Any decision rendered at an administrative hearing held under this section shall have no effect on any criminal case arising from any violation of § 3-3-203(a), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5).

(2) Any decision rendered by a court of law for a criminal case arising from any violation of § 3-3-203(a), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5) shall affect the administrative suspension, disqualification, or revocation of the driver's license as follows:

(A) A plea of guilty or nolo contendere or a finding of guilt by the court has no effect on any administrative hearing held under this section;

(B)(i) An acquittal on the charges or a dismissal of charges serves to reverse the suspension, disqualification, or revocation of the driver's license suspended or revoked under this section.

(ii) The office shall reinstate the person's driver's license at no cost to the person, and the charges shall not be used to determine the number of previous offenses when administratively suspending, disqualifying, or revoking the driving privilege of any arrested person in the future; and

(C) The office shall convert any initial administrative suspension or revocation of a driver's license for violating § 5-65-103 to a suspension or revocation for violating § 5-65-303, if the person is convicted of violating § 5-65-303 instead of § 5-65-103.

(e) Any person whose privilege to drive has been denied, suspended, disqualified, or revoked shall remain under the denial, suspension, disqualification, or revocation and remain subject to penalties as provided in § 5-65-105 until such time as that person applies for, and is granted by the office, reinstatement of the privilege to drive.

(f) The administrative suspension, disqualification, or revocation of a driver's license as provided for by this section is supplementary to and in addition to a suspension, disqualification, or revocation of a driver's license that is ordered by a court of competent jurisdiction for an offense under §§ 5-64-710, 5-65-116, and 27-16-914, or any other traffic or criminal offense in which a suspension, disqualification, or revocation of the driver's license is a penalty for the violation.

(g) For any arrest or offense occurring before July 30, 1999, but that has not reached a final disposition as to judgment in court, the offense

shall be decided under the law in effect at the time the offense occurred, and any defendant is subject to the penalty provisions in effect at that time and not under the provisions of this section.

(h)(1)(A) A person whose license is suspended or revoked pursuant to this section shall:

(i) Both:

(a) Furnish proof of attendance at and completion of the alcoholism treatment program, alcohol education program, or alcohol and driving education program required by § 5-65-104(b)(1) or § 5-65-307(a)(1) before reinstatement of his or her suspended or revoked driver's license; and

(b) Pay any fee for reinstatement required under § 5-65-119 or § 5-65-304; or

(ii) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(B) An application for reinstatement shall be made to the office.

(2) Even if a person has filed a de novo petition for review pursuant to subsection (c) of this section, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(3) A person suspended under this section may enroll in an alcohol education program prior to disposition of the offense by the circuit court, district court, or city court, but is not entitled to any refund of a fee paid if the charge is dismissed or if the person is acquitted of the charge.

History. Acts 1999, No. 1077, § 21; 2003, No. 541, §§ 2-5; 2005, No. 1535, § 2; 2005, No. 1768, § 6.

Amendments. The 2003 amendment inserted (a)(8)(B)(iv), (c)(1)(B), (c)(2)(B), (c)(4)(B) and (d)(2)(C) and made related changes.

The 2005 amendment by No. 1535 inserted “§ 3-3-203(a)” in (a)(1)(A), (d)(1) and (d)(2); in (a)(4)(A), inserted “or she,” added (a)(4)(A)(i), and inserted the subdivision (a)(4)(A)(ii), (a)(4)(A)(ii)(a), and

(a)(4)(A)(ii)(b) designations; substituted “and the report” for “which” in present (a)(4)(A)(ii); deleted “is accompanied by” from the beginning of present (a)(4)(A)(ii)(b); added (a)(4)(B)(vii) and (a)(8)(D)(iii); and made related changes.

The 2005 amendment by No. 1768 inserted “or programs required by § 5-65-104(b)(1) or § 5-65-307(a)(1)” in (h)(1)(A)(i)(a); and substituted “circuit, district, or city court” for “municipal or circuit court” in (h)(3).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal

Law, Driving While Intoxicated, 26 UALR L.J. 367.

5-65-403. Notice and receipt from arresting officer.

(a) At the time of arrest for violating § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2), the arresting law enforcement officer shall provide written notice to the arrested person:

(1) That if the arrested person's driving privileges have been suspended, disqualified, or revoked for violating § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) in the previous five (5) years, the registration of any motor vehicle owned by the arrested person is suspended effective in thirty (30) days;

(2) Of the right to a hearing within twenty (20) days; and

(3) That if a hearing is to be requested the hearing request is required to be made within seven (7) calendar days of the notice being given.

(b) The receipt shall also contain phone numbers and the address of the Office of Driver Services and inform the arrested person of the procedure for requesting a hearing.

(c) If the office is unable to conduct a hearing within the twenty-day period, a temporary permit shall be issued and is valid until the date of the hearing.

(d)(1) The seized license, permit, or other evidence of driving privilege and a copy of the receipt form issued to the arrested person shall be attached to the sworn report of the arresting law enforcement officer and shall be submitted by mail or in person to the Director of the Department of Finance and Administration or his or her designated representative within seven (7) days of the issuance of the receipt.

(2) The failure of the arresting law enforcement officer to timely file the sworn report does not affect the authority of the office to suspend the registration of any motor vehicle owned by the arrested person.

(e) Any notice from the office required under this section that is not personally delivered shall be sent as provided by § 5-65-402.

(f)(1) If the arrested person is a nonresident, the arrested person's motor vehicle registration in Arkansas shall be suspended in the same manner as that of a resident.

(2) The office shall notify the office that issued the nonresident's motor vehicle registration of the action taken by the office.

(g) The hearing shall be held by the office at the conclusion of any hearing under § 5-65-402 and the scope of the hearing is limited to:

(1) Determining if the arrested person's driving privileges had been suspended, revoked, or disqualified for violation of § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) in the five (5) years prior to the current offense; and

(2) Determining if any motor vehicle is licensed or registered in the arrested person's name as either owner or co-owner of the motor vehicle.

(h)(1)(A) A person adversely affected by the hearing disposition order of the office or its authorized agent may file a de novo petition for review within thirty (30) days in the circuit court in the county where the offense took place.

(B) The filing of a petition for review does not stay or place in abeyance the decision of the office or its authorized agent.

(2) An administrative hearing held pursuant to this section is exempt from the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(3) On review, the circuit court shall hear the case de novo in order to determine whether, based on a preponderance of the evidence, a ground exist for suspension of the person's motor vehicle registration.

(i) The suspension ordered shall be equal to the suspension of driving privileges ordered under § 5-65-402 or one (1) year, whichever is longer, but shall not exceed five (5) years.

(j)(1)(A) Upon determination that a person is completely dependent on the motor vehicle for the necessities of life, the Director of the Department of Finance and Administration may grant a restricted registration to a family member or co-owner of any immobilized motor vehicle.

(B) A restricted registration is not valid for use by the person whose driving privileges have been suspended or revoked.

(2) Operation of a motor vehicle in a manner inconsistent with the restricted registration or license plate has the same effect as operating an unlicensed motor vehicle.

(k) If the director orders immobilization of a motor vehicle, notice of immobilization shall be sent by first class mail to any persons, other than the arrested person, listed as an owner or co-owner of the immobilized motor vehicle in the records of the Office of Motor Vehicle.

History. Acts 1999, No. 1077, § 21.

A.C.R.C. Notes. As enacted by Acts 1999, No. 1077, § 21, this section contained a subsection (j) that read: "The

immobilization of motor vehicles shall apply to all offenses occurring on or after January 1, 2000."

CHAPTER 66

GAMBLING

SECTION.

- 5-66-101. Construction of statutes.
- 5-66-102. Duty of officer.
- 5-66-103. Gambling houses.
- 5-66-104. Gaming devices — Prohibition.
- 5-66-105. Gaming devices — Financial interest.
- 5-66-106. Gaming devices — Betting.
- 5-66-107. Gaming devices — In buildings or on vessels.
- 5-66-108. Gaming devices — Search warrants.
- 5-66-109. Gaming devices — Vagrants.
- 5-66-110. Keno, etc.
- 5-66-111. Pinball machines, etc.

SECTION.

- 5-66-112. Card games — Betting.
- 5-66-113. Games of hazard or skill — Betting.
- 5-66-114. Sports or games — Transmission of information.
- 5-66-115. Sports or games — Bribery of participants.
- 5-66-116. Horseracing — Betting.
- 5-66-117. Horseracing — Agency service wagering.
- 5-66-118. Lottery, etc. — Tickets.
- 5-66-119. Lottery — Promotion through sales.

Cross References. Fines, § 5-4-201.
Recovery of gambling debts and losses, § 16-118-103.
Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1877, No. 71, § 8: effective on passage.
Acts 1907, No. 55, § 5: effective on passage.

Acts 1939, No. 209, § 7: approved Mar. 9, 1939. Emergency clause provided: "It is hereby found to be a fact that numerous policy and number games are being operated in this state and on that account an emergency is hereby declared to exist and this act shall become effective immediately upon its passage."

Acts 1951, No. 250, § 3: approved Mar. 19, 1951. Emergency clause provided: "Whereas, the present law is inadequate insofar as it relates to the bribery of participants in amateur and professional sports, and this act being necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist and this act shall take effect and be in full force and effect from and after its passage."

Acts 1953, No. 355, § 5: Mar. 28, 1953. Emergency clause provided: "Whereas, the General Assembly has ascertained that there is a lack of uniformity in the interpretation of the gaming laws of the State of Arkansas, and that an urgent need exists for clarification thereof, and that there is danger of harmful and wide spread gaming and bookmaking establishments being set up in this State unless clarification of the gaming laws be made; and for the accomplishment of this purpose this Act is adopted. An emergency is, therefore, declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

Acts 1977, No. 791, § 5: Mar. 28, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the laws are uncertain with reference to the legality of messenger or agency service wagering on thoroughbred horses in and out of the State of Arkansas and that there is an urgent need to end this uncertainty and confusion. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 835, § 4: Apr. 8, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present laws relating to the production, sale and possession of lottery tickets are somewhat vague and could be interpreted to prohibit the printing or other production of lottery tickets by companies in this State for use in states where lotteries are permitted; that the laws relating to lotteries were designed to prohibit the operation of lotteries in Arkansas and were not intended to prohibit the printing of lottery tickets for use where lotteries are permitted; that this Act is designed to clarify such laws and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 38 *Am. Jur.* 2d, *Gambling*, § 31 et seq.

Ark. L. Rev. *Legal Control of Business in Arkansas*, 5 *Ark. L. Rev.* 137.

C.J.S. 38 *C.J.S.*, *Gaming*, § 84 et seq.

CASE NOTES

City Ordinance.

A city ordinance declaring that pinball machines or other gaming devices are a public nuisance and that it is unlawful for any business establishment or individual

to possess pinball machines in any manner within the city is void because in conflict with state statutes. *City of Piggott v. Eblen*, 236 Ark. 390, 366 S.W.2d 192 (1963) (decision under prior law).

5-66-101. Construction of statutes.

(a) In their construction of the statutes prohibiting gaming, the judges of the several courts in this state shall construe the statutes liberally, with a view of preventing persons from evading the penalty of the law by changing of the name or the invention of new names or devices that now are, or may hereafter be, brought into practice, in any and in all kinds of gaming, and all general terms of descriptions shall be so construed as to have effect, and include all such games and devices as are not specially named.

(b) In all cases in which construction is necessary, the construction shall be in favor of the prohibition and against the offender.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 13; C. & M. Dig., § 2645; Pope's Dig., § 3335; A.S.A. 1947, § 41-3265.

CASE NOTES

ANALYSIS

Gaming defined.
Jurisdiction.
Role of chancery courts.

Gaming Defined.

Gaming is the risking of money, between two or more persons, on a contest or chance of any kind, where one must be loser and the other gainer. The definition of gambling, previously set forth by the court, which comports with the common understanding of the term "gambling," prevents the statutes from being void-for-vagueness. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

Jurisdiction.

The general rule prohibiting chancery courts from interfering with prosecutorial functions applied, and the chancery court had no jurisdiction to enjoin the prosecuting attorney from prosecuting any opera-

tion that constitutes gambling as described in the Ark. Const., Art. 19, § 14, and defined in this section. *Dickey v. Signal Peak Enters.*, 340 Ark. 276, 9 S.W.3d 517 (2000).

Role of Chancery Courts.

There is a narrow exception to the rule that chancery courts will refrain from interfering with prosecutorial functions, but that exception is limited to the chancery court's protection of property rights in the form of lawful businesses; it does not apply to forms of illegal gambling. *Dickey v. Signal Peak Enters.*, 340 Ark. 276, 9 S.W.3d 517 (2000).

Cited: *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944); *Bostic v. City of Little Rock*, 243 Ark. 50, 418 S.W.2d 619 (1967); *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996); *State v. 26 Gaming Machs.*, 356 Ark. 47, 145 S.W.3d 368 (2004).

5-66-102. Duty of officer.

When it comes to the knowledge of any sheriff, coroner, or constable, or any of their deputies, that any person is guilty of any offense created or prohibited by this section and §§ 5-66-101, 5-66-104 — 5-66-107, and 5-66-109, it is their duty to give notice of the offense to any judge or justice of the peace for the county who shall:

(1) Issue his or her warrant and cause the offender to be brought before him or her;

(2) Examine the matter in a summary manner; and

(3) Discharge, bail, or commit the offender, as the circumstances and the right of the case may require.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 9; C. & M. Dig., § 2642; Pope's Dig., § 3332; A.S.A. 1947, § 41-3264.

5-66-103. Gambling houses.

Any person who:

(1) Keeps, conducts, or operates, or who is interested directly or indirectly in keeping, conducting, or operating any gambling house or place where gambling is carried on;

(2) Sets up, keeps, or exhibits or causes to be set up, kept, or exhibited or assists in setting up, keeping, or exhibiting any gambling device; or

(3) Is interested directly or indirectly in running any gambling house or in setting up and exhibiting any gambling device, either by furnishing money or another article, for the purpose of carrying on any gambling house,

is deemed guilty of a felony and on conviction shall be confined in the Department of Correction for not less than one (1) year nor more than three (3) years.

History. Acts 1913, No. 152, §§ 1, 2; C. & M. Dig., §§ 2632, 2633; Pope's Dig., §§ 3322, 3323; A.S.A. 1947, §§ 41-3251, 41-3252; Acts 2005, No. 70, § 1.

Amendments. The 2005 amendment deleted former (b).

Cross References. Municipalities may suppress, § 14-54-103.

RESEARCH REFERENCES

Ark. L. Rev. Kindt, Legalized Gambling Activities as Subsidized by Taxpayers, 48 Ark. L. Rev. 889.

CASE NOTES

ANALYSIS

Constitutionality.

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Purpose.

Bingo.

Common-law nuisance.

Evidence.

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Indictment.

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Intent.

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Sentence.

Constitutionality.

This section is not unconstitutionally overbroad. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

Construction.

This sentencing provisions of this section and the Criminal Code can be read in harmony: one defines the term of imprisonment and the other permits the court to impose suspension or probation. *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

Purpose.

Statutes pertaining to gambling show clear intent to suppress all unlicensed gambling in this state. *Albright v.*

Muncrief, 206 Ark. 319, 176 S.W.2d 426 (1944).

Bingo.

Bingo establishments where money and risk were plainly involved had fair warning that their actions were prohibited. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

The operation of a commercial bingo hall meets the definition of a gambling house, and is therefore a common-law public nuisance. *Masterson v. State ex rel. Bryant*, 329 Ark. 443, 949 S.W.2d 63 (1997).

Common-Law Nuisance.

Although persons who maintain a place for betting on horse races may be prosecuted under this section and § 5-66-116 they might also be prosecuted under former section which provided for punishment of common-law crimes for maintaining a common-law nuisance. *Blumensteil v. State*, 148 Ark. 421, 230 S.W. 262 (1921).

Operator of bookmaking establishment, which was a gambling house and therefore a public nuisance at common law and a felony under this section, was precluded from invoking the protection of a court of equity in order to operate it without molestation from the state police. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1944).

Evidence.

Testimony by the owner of the property regarding a small hole which had been cut in a door of which he had no knowledge, as to whether hole was used as a peep hole, or as a serving shelf for food held properly refused. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948).

It is not necessary that the state prove that the defendant actually engaged in wagering to convict under this section. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

Gambling Devices.

Tables, blackboards and other articles being actually used by bookmaker in carrying on the betting operations and not being used for any other purpose were gambling devices. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1944).

There may be gambling devices that are no less such, although not always so used,

but which, from their nature, may be used for other purposes. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Teletype machines used to furnish horse race information to various gambling houses with operator's knowledge of the use made by the gambling houses of the information which he was furnishing them from the teletype machine were converted into gambling devices. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Testimony that police officer answered calls to a defendant's telephone regarding racing forms, placing bets, etc., held admissible to show the use being made of the telephone. *Liberto v. State*, 248 Ark. 350, 451 S.W.2d 464 (1970).

Gambling Houses.

One would be guilty of running a gambling house if he permitted gaming tables to be exhibited and gambling to be carried on in a house controlled by him whether he engaged in gambling or maintained or exhibited such tables and other gambling devices or not. *Turner v. State*, 153 Ark. 40, 239 S.W. 373 (1922).

An establishment maintained for the purpose of receiving and making bets on horse races is a gambling house. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1944); *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Refusal to instruct jury that it was necessary for it to find that defendant receive a profit or other remuneration before the defendant could be found guilty of operating a gambling house held not error, as gravamen of the offense is the maintaining of a house for gambling, and not the profit realized therefrom. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948).

Evidence held sufficient to support a conviction for operation of a gambling house. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948); *Pope v. State*, 215 Ark. 216, 219 S.W.2d 940 (1949).

Where land, on which there were plank tables used for gambling purposes, was part of railroad right of way, but, as far as defendant's patrons were concerned, defendant controlled place, defendant might properly be convicted. *Colbert v. State*, 218 Ark. 790, 238 S.W.2d 749 (1951).

Evidence of gambling and statement of defendant to officers that he and another

person owned the place was sufficient to make a case for the jury in prosecution for keeping a gambling house. *Copeland v. State*, 226 Ark. 198, 289 S.W.2d 524 (1956).

The keeping of a gambling house is not limited by this section to a place where those engaged in gambling find shelter and it was not error to refuse an instruction that a finding that the defendant operated a place where those desiring to engage in gambling might resort to and find shelter while engaged in gambling was required for conviction. *Liberto v. State*, 248 Ark. 350, 451 S.W.2d 464 (1970).

Evidence of cockfighting and loud, open gambling on premises owned by the defendant was sufficient to convict under this section. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

Indictment.

An indictment alleging that a sheriff, knowing that certain persons were exhibiting gambling devices in the county, failed to arrest them was held to state an offense under this section. *Mays v. Robertson*, 172 Ark. 279, 288 S.W. 382 (1926).

Instructions.

Instructions by the court conformed to this section, where the jury was required under the instructions to find that the defendant had an interest in the conduct and operation of the gambling house. *Sorrentino v. State*, 214 Ark. 115, 214 S.W.2d 517 (1948).

Where grand jury returns separate indictments against defendant, one for a felony in operating a gambling house, and one for a misdemeanor in setting up gaming devices, and defendant proceeds to trial on felony charge, he is not entitled to an instruction by the court on misdemeanor charge. *Pope v. State*, 215 Ark. 216, 219 S.W.2d 940 (1949).

Intent.

When the mental culpability requirement of § 5-2-203 is read into this section, it is clear that a person must act purposely, knowingly, or recklessly for a violation to occur. *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996).

Jury Question.

Whether defendant's house in a residential area was a gambling house was a jury question. *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893 (1974).

Lesser Included Offense.

It was not error for the judge to refuse to give an instruction defining the offense under § 5-66-104 as a lesser included offense of that proscribed by this section where the defendant was either guilty of operating a gambling house or guilty of nothing at all. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

Sentence.

The alternative-sentencing provisions, permitting suspended sentence or probation, are applicable to offenses under this section, even though this section has its own penal provision. *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

Cited: *Buchanan v. State*, 214 Ark. 835, 218 S.W.2d 700 (1948); *Hardwick v. State*, 220 Ark. 464, 248 S.W.2d 377 (1952); *Campbell v. City of Hot Springs*, 232 Ark. 878, 341 S.W.2d 225 (1961); *Moore v. State*, 244 Ark. 1197, 429 S.W.2d 122 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 714, 21 L. Ed. 2d 705 (1969); *State v. Adkisson*, 251 Ark. 119, 471 S.W.2d 332 (1971); *Thompson v. State*, 298 Ark. 502, 769 S.W.2d 6 (1989); *United States v. Thompson*, 925 F.2d 234 (8th Cir. 1991).

5-66-104. Gaming devices — Prohibition.

Any person who sets up, keeps, or exhibits any gaming table or gambling device, commonly called "A. B. C.", "E. O.", roulette, or rouge et noir, or any faro bank, or any other gaming table or gambling device, or bank of the like or similar kind, or of any other description although not named in this section, be the name or denomination what it may, adapted, devised, or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost, is deemed guilty of a misdemeanor and on conviction shall be fined in any

sum not less than one hundred dollars (\$100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 1; C. & M. Dig., § 2630; Pope's Dig., § 3320; A.S.A. 1947, § 41-3253.

CASE NOTES

ANALYSIS

Purpose.
Acts constituting offense.
Evidence.
Gambling device.
Gaming defined.
Lesser included offense.
Money or property.
Multiple convictions.
Separate offenses.

Purpose.

It was the purpose of this section to suppress any of the gambling devices constantly being invented to evade the gambling laws. *Portis v. State*, 27 Ark. 360 (1872); *Euper v. State*, 35 Ark. 629 (1880).

Statutes pertaining to gambling show clear intent to suppress all unlicensed gambling in this state. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Acts Constituting Offense.

One who keeps a billiard table and permits others to play upon it for so much per game, to be paid for by the loser, violates this section. *State v. Sanders*, 86 Ark. 353, 111 S.W. 454, 19 L.R.A. (n.s.) 913 (1908).

The fact that the owner of the table plays in the game of poker and furnishes chips to others does not make him an exhibitor of a gaming table. *Tully v. State*, 88 Ark. 411, 114 S.W. 920 (1908).

One who furnishes any device by which money may be won or lost through chance or skill is guilty of exhibiting a gambling device. *Johnson v. State*, 101 Ark. 159, 141 S.W. 493 (1911).

One who shows a table specially prepared for a game of "craps" for the purpose of attracting betters, and who retains, for the use of the table, a certain percent of the bets, violates this section. *Gershner v. State*, 106 Ark. 488, 153 S.W. 600 (1913).

Evidence.

Evidence held sufficient to support conviction. *Hill v. State*, 264 Ark. 313, 571 S.W.2d 228 (1978).

A telephone-card vending machine was an illegal gambling device where the machine operated as follows: (1) a patron would place a \$ 1 bill in the machine, and the machine would then print an "Emergency Long Distance Telephone Card" good for three minutes of long distance; (2) at the same time, the machine would register a number of play credits; (3) the patron could then play a game on the machine "similar to tic-tac-toe on a 3 x 3 matrix consisting of various symbols which may be lined up for additional points," (4) these points could then be redeemed for a cash prize ranging from \$ 1 to \$ 1,000; (5) additionally, after using the prepaid telephone card, the patron could mail the used card to the defendant for a supplemental drawing for various prizes such as electronics or airline tickets; and (6) if a patron did not wish to purchase a telephone card but still wanted to play the game, he or she could use one of the self-addressed, stamped post cards provided at the store and mail it to the defendants for a free-play certificate, which could be redeemed for a \$ 1 bill to play the game. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001).

Gambling Device.

Particular items held to be gambling devices. *Riley v. State*, 120 Ark. 450, 179 S.W. 661 (1915); *Howell v. State*, 184 Ark. 109, 40 S.W.2d 782 (1931); *Steed v. State*, 189 Ark. 389, 72 S.W.2d 542 (1934); *Stanley v. State*, 194 Ark. 483, 107 S.W.2d 532 (1937).

Three countertop machines were not gaming devices per se where no tokens, money, or prizes were offered in connection with the machines; the machines

were more akin to video arcade machines intended for amusement because a player inserted money and could play gambling-like games, but never received anything in return except amusement. *State v. 26 Gaming Machs.*, 356 Ark. 47, 145 S.W.3d 368 (2004).

Teletype machines used to furnish horse racing information to various gambling houses with operator's knowledge of the use made by the gambling houses of the information which he was furnishing them from the teletype machine were converted into gambling devices. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Mere intention to use seized radio equipment in connection with gambling did not make radio equipment a gambling device, if equipment had never been used for gambling. *Burnside v. State*, 219 Ark. 596, 243 S.W.2d 736 (1951).

Merely setting up a machine that gives free games does not violate this section, but when the free games won on the machine were converted to cash by the proprietor's paying off the games in money the machine clearly became a gambling device. *Bostic v. City of Little Rock*, 241 Ark. 671, 409 S.W.2d 825 (1967).

Trial court correctly found the owners' video poker and video slot machines were illegal gaming devices and subject to destruction in that they were designed for the purpose of playing a game of chance whereby winning credits entitled the player to continue to play, or if a player had won sufficient credits, to redeem the credits for a prize; although the owners had paid taxes on them as amusement devices, that fact alone did not legalize, authorize, license, or permit any machine equipped with any automatic payoff mechanism. *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848 (2002).

Just as devices described as slot machines in another case were determined to be illegal gaming devices, defendant's devices were gambling devices proscribed by this section; because they were slot machines, they were expressly excluded by § 26-57-403(a) from the definition of amusement devices found at § 5-6-402(1). *Paris v. State*, — Ark. App. —, — S.W.3d

—, 2004 Ark. App. LEXIS 633 (Sept. 22, 2004).

Gaming Defined.

Gaming is the risking of money, between two or more persons, on a contest or chance of any kind, where one must be loser and the other gainer. The definition of gambling, previously set forth by the court, which comports with the common understanding of the term "gambling," prevents the statutes from being void for vagueness. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992).

Lesser Included Offense.

Refusal to give an instruction defining the offense under this section as a lesser included offense of that prescribed by § 5-66-103 where the defendant was either guilty of operating a gambling house or guilty of nothing at all held proper. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

Money or Property.

The words "money or property" as used in this section mean any money or any valuable thing or any representative of anything that is esteemed of value. *Ran-kin v. Mills Novelty Co.*, 182 Ark. 561, 32 S.W.2d 161 (1930).

Multiple Convictions.

This section is violated by every one who sets up or exhibits any one of the games named, and he may be separately convicted for maintaining each device. *Jacobs v. State*, 100 Ark. 591, 141 S.W. 489 (1911).

Separate Offenses.

The offense under this section is distinct from that defined by § 5-66-107, and if both are charged in the same indictment, one will be quashed. *State v. Morris*, 45 Ark. 62 (1885); *Lyman v. State*, 90 Ark. 596, 119 S.W. 1116 (1909).

Cited: *Colbert v. State*, 218 Ark. 790, 238 S.W.2d 749 (1951); *Bostic v. City of Little Rock*, 243 Ark. 50, 418 S.W.2d 619 (1967); *Flaherty v. State*, 255 Ark. 187, 500 S.W.2d 87 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893 (1974); *Mullins v. State*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 727 (Nov. 18, 2004).

5-66-105. Gaming devices — Financial interest.

If any person is in any way, either directly or indirectly, interested or concerned in any gaming prohibited by § 5-66-104, either by furnishing money or another article for the purpose of carrying on gaming, or is interested in the loss or gain of such prohibited gaming, he or she is deemed guilty of a misdemeanor and on conviction shall be fined as in § 5-66-104.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 2; C. & M. Dig., § 2631; Pope's Dig., § 3321; A.S.A. 1947, § 41-3254.

CASE NOTES

ANALYSIS

Employees and employer.
Instruction.

Employees and Employer.

Any person who is employed by and assists the proprietor in the operation of a gambling device is subject to prosecution. Trimble v. State, 27 Ark. 355 (1872).

The employment of another to watch after a slot machine, in the operation of which money was lost and won, was an

offense under this section. Jeffries v. State, 61 Ark. 308, 32 S.W. 1080 (1895).

Instruction.

Refusal to give instruction defining the offense covered by this section as lesser included offense of the crime defined by § 5-66-103(a), where there was no evidence which would have supported a conviction under this section, held proper. Blankenship v. State, 258 Ark. 535, 527 S.W.2d 636 (1975).

Cited: Hill v. State, 264 Ark. 313, 571 S.W.2d 228 (1978).

5-66-106. Gaming devices — Betting.

If any person is guilty of betting any money or other valuable thing or any representative of any thing that is esteemed of value, on any game prohibited by § 5-66-104, upon conviction he or she shall be fined in any sum not exceeding one hundred dollars (\$100) nor less than fifty dollars (\$50.00).

History. Rev. Stat., ch. 44, div. 6, art. 3, § 3; C. & M. Dig., § 2634; Pope's Dig., § 3324; A.S.A. 1947, § 41-3255.

CASE NOTES

Cited: Gordon v. Town of De Witt, 106 Ark. 283, 153 S.W. 807 (1913); Henry v. State, 280 Ark. 24, 655 S.W.2d 372 (1983).

5-66-107. Gaming devices — In buildings or on vessels.

If the owner or occupant of any house, outhouse, or other building or any steamboat, or other vessel shall knowingly permit or suffer any of games, tables, or banks mentioned in § 5-66-104 or shall suffer any kind of gaming under any name whatsoever, to be carried on or exhibited in their houses, or outhouses or other buildings, or on board of any

steamboat, flatboat, keelboat, or other vessel on any of the waters within this state, upon conviction, the owner or occupant shall be punished as provided in § 5-66-104.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 4; C. & M. Dig., § 2635; Pope's Dig., § 3325; A.S.A. 1947, § 41-3256.

CASE NOTES

ANALYSIS

Purpose.

Acts constituting offense.

Indictment.

Separate offense.

Purpose.

The offense designed to be punished by this section is the permitting by the owner of any house of any of the games prohibited in § 5-66-104, and not the playing or betting at the games mentioned in § 5-66-112. *Stith v. State*, 13 Ark. (8 English) 680 (1853).

Acts Constituting Offense.

Where the keeper of a shop rents an adjoining room, with an understanding that it is to be used by the lessee for gaming purpose and permits the game of faro to be carried on in that room under his observation, he is guilty of knowingly permitting gaming to be carried on in his house. *Brookway v. State*, 36 Ark. 629 (1880).

This section is violated by everyone who sets up, keeps, or exhibits any gambling devices without respect to whether more than one is exhibited at the same time and place. *Jacobs v. State*, 100 Ark. 591, 141 S.W. 489 (1911).

Indictment.

Indictment held sufficient. *Turner v. State*, 153 Ark. 40, 239 S.W. 373 (1922).

Separate Offense.

The offense of exhibiting a gambling device and knowingly permitting it to be exhibited in a house owned or occupied by the accused are not the same, but distinct and if charged in the same indictment it will be quashed upon demurrer unless the prosecuting attorney will elect upon which he will prosecute. *State v. Morris*, 45 Ark. 62 (1885).

Cited: *Vanderworker v. State*, 13 Ark. (8 English) 700 (1853); *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S.W. 257 (1902).

5-66-108. Gaming devices — Search warrants.

(a) It is made and declared to be the duty and required of the judges of the circuit courts, the presiding judges of the county courts, and also of the justices of the peace, on information given or on their own knowledge, or when they have reasonable ground to suspect, that they issue their warrant to the sheriff, coroner, or constable as the case may be most convenient, directing in the warrant a search for gaming tables, or devices mentioned or referred to in § 5-66-104, and, directing that on finding any, the devices shall be publicly burned by the officer executing the warrant.

(b) The officer executing a warrant, and burning, by virtue of the warrant, any gaming device, as required in subsection (a) of this section, on making his return to the judge or justice who issued the warrant, and getting the statement of the judge or justice that the warrant had been returned to the judge or justice duly executed by the burning of the gaming device, stating or describing the gaming device

burnt, endorsed on the warrant, the officer is entitled to his or her fees for the service, to be paid by the person keeping the gambling table.

History. Rev. Stat., ch. 44, div. 6, art. 3, §§ 6, 7; C. & M. Dig., §§ 2637, 2638; Pope's Dig., §§ 3327, 3328; A.S.A. 1947, §§ 41-3259, 41-3260.

CASE NOTES

ANALYSIS

Constitutionality.

Damages.

Evidence.

Hearing.

Subjects of confiscation.

Validity of warrant.

Constitutionality.

This section is not unconstitutional in not providing for a jury trial. *Furth v. State*, 72 Ark. 161, 78 S.W. 759 (1904).

Former part of this section conferring power to issue warrants upon judges of the Supreme Court held unconstitutional; however the invalidity of that part of this section did not affect the remaining parts, as the legislature would have enacted this law even though Supreme Court judges had not been included. *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d 529 (1942).

This section is not unconstitutional as depriving owner of gambling device of his property without due process. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Damages.

Owner of property summarily destroyed is not without remedy if destruction be wrongful, for if property is not such a device as contemplated by this section the officer is responsible to owner in damages. *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S.W. 257 (1902).

Evidence.

Where a sheriff, in executing a search warrant for other items, discovered and seized gambling devices, such gambling devices were not obtained by unlawful search and were admissible in evidence at the trial of the possessor for keeping a gaming device. *Moore v. State*, 244 Ark. 1197, 429 S.W.2d 122 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 714, 21 L. Ed. 2d 705 (1969).

Hearing.

It was proper for the circuit court to issue a writ for the seizure of the property

and give owner of property an opportunity to be heard before issuing the order for its destruction. *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S.W. 257 (1902).

Subjects of Confiscation.

This section does not authorize the seizure and destruction of tables or other useful furniture simply because it may be found in a gambling house or because they may be used in playing cards or other games upon which money is bet, but permits destruction of those tables and devices only that are made and kept solely for the purpose of carrying on a business which the law forbids. *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S.W. 257 (1902).

Tables, blackboards and other articles being actually used by bookmaker in carrying on the betting operations and not being used for any other purpose are gambling devices and subject to summary destruction by officers under authority of search warrant. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1944).

Teletype machines used to furnish horse race information to various gambling houses, with operator's knowledge of the use made by the gambling houses of the information which he was furnishing them from the teletype machine, were gambling devices, subject to seizure. *Albright v. Muncrief*, 206 Ark. 319, 176 S.W.2d 426 (1944).

Where slot machines found in warehouse were gambling devices it was proper for court to order their destruction though not actually set up for public use. *Bell v. State*, 212 Ark. 337, 205 S.W.2d 714 (1947).

After affirmance of defendant's conviction of keeping a gaming device, to wit a pinball machine the operators of which defendant had paid prizes for free games registered on the machine, the trial court had power to order it publicly burned as provided in this section. *Bostic v. City of Little Rock*, 243 Ark. 50, 418 S.W.2d 619 (1967).

Validity of Warrant.

A warrant requiring a search is of doubtful validity if not issued "upon probable cause, supported by oath or affirmation" as required by Ark. Const., Art. 2, § 15, but if no search is required a supporting affidavit is unnecessary. *Garland Novelty Co. v. State*, 71 Ark. 138, 71 S.W. 257 (1902).

Where search warrant was valid on its face and there was no proof that the oath or affirmation was not made prior to its issuance, it must be presumed that all things essential to its validity were done before it was issued. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1944).

5-66-109. Gaming devices — Vagrants.

(a) Any keeper or exhibitor of any gaming table, bank, or other gambling device and any person who travels or remains in a steamboat, or goes about from place to place for the purpose of gaming is deemed and treated as a vagrant.

(b) Any keeper or exhibitor of either of the gaming tables, called "A. B. C." or "E. O." or any other table distinguished or known by any other name, letter, or figure, such as faro bank, rouge et noir, or any gaming bank, of the same or like kind, with, or without a name, is deemed and rated as a vagrant.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 5; Rev. Stat., ch. 154, § 2; C. & M. Dig., §§ 2636, 2802; Pope's Dig., §§ 3326, 3506; A.S.A. 1947, §§ 41-3257, 41-3258.

Cross References. Loitering, lingering in public place for purpose of unlawful gambling, § 5-71-213.

CASE NOTES**ANALYSIS**

Applicability.
Evidence.

Applicability.

This section applies to all persons who "go about from place to place for the purpose of gaming" whether for the purpose of participation in banking games or in other kinds of gambling. *Davis v. State*, 109 Ark. 341, 159 S.W. 1129 (1913).

Evidence.

Where the defendant is charged with

vagrancy, evidence of games participated in by him in other counties is competent to show the purpose of the defendant's wandering about, whether to pursue a lawful vocation or to habitually engage in the pursuit of gaming. *Davis v. State*, 109 Ark. 341, 159 S.W. 1129 (1913).

Evidence of acts of gambling more than a year prior to the indictment is admissible, being a part of a series of acts indicating continuousness in going from place to place for purposes of gaming. *Cannon v. State*, 114 Ark. 263, 169 S.W. 812 (1914).

5-66-110. Keno, etc.

(a)(1) If any person sets up or exhibits, or causes to be set up or exhibited, or aids or assists in setting up or exhibiting in any county, city, or town in the state, any gaming device commonly known and designated as "keno" or any similar device, by any other name or without a name, any person so setting up or exhibiting the gaming device, or aiding or assisting in exhibiting or setting up the gaming device, is guilty of a misdemeanor.

(2) On indictment and conviction before the circuit court or on conviction before a justice of the peace, the person shall be fined in any

sum not less than two hundred dollars (\$200) for benefit of the common school fund.

(b)(1) It is the duty of each prosecuting attorney in this state who knows or is informed of any person exhibiting or setting up, or aiding or assisting in setting up any device described in subsection (a) of this section in his or her district, to take immediate steps to have the person immediately arrested for trial, and the prosecuting attorney shall have the person arrested as provided in this subsection for each separate offense done or committed on every separate day.

(2) If any prosecuting attorney who knows or is informed of any violation of this section refuses or neglects to cause the arrest and trial of the person so offending within five (5) days next after he or she knows or is informed of the offense, upon indictment and conviction, the prosecuting attorney shall be fined in any sum not less than five hundred dollars (\$500).

(c)(1) It is the duty of every justice of the peace, knowing or being informed of any violation of subsection (a) of this section, in his or her township, for which the person has not been arrested or tried under the provisions of this section, to cause the arrest and trial of the person so offending, for each separate offense done or committed against the provisions of this section.

(2) If any justice of the peace who knows or is informed of any violation of subsection (a) of this section in his or her township refuses or neglects to cause the arrest and trial of the person so violating subsection (a) of this section, within five (5) days next after he or she is informed of the same, the justice of the peace is guilty of a misfeasance in office, and, upon indictment and conviction, the circuit court shall remove him or her from office.

(d) No license granted by any city or town is a bar to any prosecution or conviction under a provision of this section or any excuse, protection, or justification for any justice of the peace or prosecuting attorney failing to carry out the same.

History. Acts 1877, No. 71, §§ 1-5, 7, Dig., §§ 3336-3341; A.S.A. 1947, §§ 41-p. 70; C. & M. Dig., §§ 2646-2651; Pope's 3266 — 41-3271.

5-66-111. Pinball machines, etc.

(a)(1) Any coin-operated pinball machine or other device that is designed so that more than one (1) coin can be inserted so as to give the player additional odds in making a high score or winning an additional free game is unlawful.

(2) The operation of the coin-operated pinball machine or other device described in subdivision (a)(1) of this section is a misdemeanor that is punishable by the imposition of a fine not to exceed one thousand dollars (\$1,000) or imprisonment in the county jail for not more than one (1) year, or both.

(b) It is the intent of this section to prohibit the use of so-called "bingo"-type pinball machines, the interstate transportation of which is prohibited by 15 U.S.C. § 1172.

(c)(1) A coin-operated amusement device, including a pinball machine, that takes only one (1) coin for each player for each game and that is equipped with flippers that can be activated by the player to propel a ball back onto the playing surface of the machine so as to prolong the playing time and increase the score attained by the player and upon which not more than twenty-five (25) free games can be won by the player are specifically designated as an amusement device.

(2) The use of an amusement device described in subdivision (c)(1) of this section is declared to be legal so long as all state and municipal taxes have been paid and the owner of the amusement device has obtained a permit, filed a bond, and paid the privilege tax required by § 26-57-401 et seq.

History. Acts 1977, No. 283, §§ 1, 2;
A.S.A. 1947, §§ 41-3201, 41-3202.

5-66-112. Card games — Betting.

If any person is guilty of betting any money or any valuable thing on any game of brag, bluff, poker, seven-up, three-up, twenty-one, vingt-et-un, thirteen cards, the odd trick, forty-five, whist, or at any other game of cards, known by any name now known to the law, or with any other or new name or without any name, upon conviction he or she shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

History. Rev. Stat., ch. 44, div. 6, art. 3,
§ 8; C. & M. Dig., § 2639; Pope's Dig.,
§ 3329; A.S.A. 1947, § 41-3261.

CASE NOTES

ANALYSIS

Acts constituting offense.

Evidence.

Indictment.

Separate offense.

Acts Constituting Offense.

Parties who play at cards under an agreement that the beaten party shall treat the others to cigars are guilty of gaming under this section. *State v. Wade*, 43 Ark. 77, 51 Am. St. R. 560 (1884).

Evidence.

A participant in the game is a competent witness. *Robinson v. State*, 41 Ark. 400 (1883).

In a prosecution for gaming by playing poker, the sheriff's testimony as to the

similarity as to arrangement and equipment in the boat where the raid took place and other poker games which he had raided was held admissible. *Honea v. State*, 176 Ark. 640, 3 S.W.2d 679 (1928).

Indictment.

An indictment for gaming need not allege the names of the parties playing the game if known, nor the grand jury's ignorance of their names if not known. *Goodman v. State*, 41 Ark. 228 (1883).

Separate Offense.

Proof of violating this section will not sustain an indictment under § 5-66-104. *Tully v. State*, 88 Ark. 411, 114 S.W. 920 (1908).

Cited: *Hudson v. State*, 173 Ark. 1169, 294 S.W. 15 (1927).

5-66-113. Games of hazard or skill — Betting.

(a) If any person is guilty of betting any money or any valuable thing on any game of hazard or skill, upon conviction he or she shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

(b) In prosecuting under subsection (a) of this section it is sufficient for the indictment to charge that the defendant bet money or another valuable thing on a game of hazard or skill, without stating with whom the game was played.

History. Acts 1855, §§ 1, 2, p. 270; C. §§ 3330, 3331; A.S.A. 1947, §§ 41-3262, & M. Dig., §§ 2640, 2641; Pope's Dig., 41-3263.

CASE NOTES

ANALYSIS

Dog racing.
Indictment.

Dog Racing.

Betting on dog races violates this section. *Fox v. Harrison*, 178 Ark. 1189, 13 S.W.2d 808 (1929) (decision prior to the enactment of § 23-111-205).

Indictment.

An indictment for betting on a game of "hazard or skill" is not objectionable for the use of the disjunction. *State v. Hester*, 48 Ark. 40, 2 S.W. 339 (1886).

Cited: *Mace v. State*, 58 Ark. 79, 22 S.W. 1108 (1893).

5-66-114. Sports or games — Transmission of information.

(a)(1) It is unlawful for any person, partnership, or corporation to receive or transmit information in the State of Arkansas relating to football, baseball, basketball, hockey, polo, tennis, horse racing, boxing, or any other sport or game for the purpose of gaming.

(2) This section does not apply to a radio station or newspaper disseminating such information as news, entertainment, or advertising medium.

(3) The provisions of this section do not apply to any commission conducting a legalized race meet within the State of Arkansas.

(b) Any teletype, telegraph ticker tape, or similar machine or device used in the transmitting or receiving of information relating to a game or sport as set out in subsection (a) of this section, that is used either directly or indirectly for the purpose of gaming, is defined and declared to be a "gaming device".

(c) Any person who violates a provision of this section and any teletype, telegraph ticker tape, or similar machine or device when used for gaming purposes, as defined in this section, is subject to the procedure and penalties as set out in §§ 5-66-101 — 5-66-110, 5-66-112, 5-66-113, 5-66-116, and 5-66-118.

History. Acts 1953, No. 355, §§ 1-3;
A.S.A. 1947, §§ 41-3282 — 41-3284.

5-66-115. Sports or games — Bribery of participants.

Any person who:

(1) Gives, promises, or offers to any professional or amateur baseball, football, hockey, polo, tennis, or basketball player or boxer or any player who participates or expects to participate in any professional or amateur game or sport or any jockey, driver, groom, or any person participating or expecting to participate in any horse race, including owners of race tracks and their employees, stewards, trainers, judges, starters, or special policemen, or to any manager, coach, or trainer of any team or participant or prospective participant in any such game, contest, or sport any valuable thing with intent to influence him or her to lose or try to lose or cause to be lost or to limit his or her or his or her team's margin of victory in a baseball, football, hockey, or basketball game, boxing, tennis, or polo match or a horse race or any professional or amateur sport or game in which such player or participant or jockey or driver is taking part or expects to take part or has any duty or connection therewith; or

(2) Solicits or accepts any valuable thing to influence him or her to lose or try to lose or cause to be lost or to limit his or her or his or her team's margin of victory in a baseball, football, hockey, or basketball game or boxing, tennis, or polo match or horse race or any game or sport in which he or she is taking part or expects to take part or has any duty or connection therewith, being a professional or amateur baseball, football, hockey, basketball, tennis, or polo player, boxer, or jockey, driver, or groom or participant or prospective participant in any sport or game or a manager, coach, or trainer of any team or individual participant or prospective participant in any such game, contest, or sport,
commits a Class D felony.

History. Acts 1951, No. 250, § 1; 1975,
No. 928, § 9; A.S.A. 1947, § 41-3288.

5-66-116. Horseracing — Betting.

(a) It is unlawful to directly or indirectly bet in this state, by selling or buying pools or otherwise, any money or other valuable thing, on any horse race of any kind whether had or run in this state or out of this state.

(b)(1) Any person who violates subsection (a) of this section is deemed guilty of a misdemeanor and:

(A) For the first offense, upon conviction shall be fined in any sum not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00);

(B) For the second offense, upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollar (\$100); and

(C) For all offenses after the second, on conviction shall be fined in any sum not more than five hundred dollars (\$500) and imprisoned in the county jail for a term of not less than thirty (30) days nor more than six (6) months.

(2) Every bet, wager, sale of pools, or purchase of pools is deemed a separate offense.

(c) It is the duty of circuit judges and prosecuting attorneys of this state, the grand juries and mayors of the cities and towns of this state, the police officers and marshals of the cities and towns, and the justices of the peace, sheriffs, and constables to enforce the provisions of this section when this section is violated in their presence or when the information of the violation is brought to their knowledge by affidavit or otherwise.

(d) If any sheriff, constable, or police officer refuses or neglects to immediately arrest and bring before some court of competent jurisdiction for trial any person who violates this section, when the knowledge of the violation is brought to his or her attention by the affidavit of any resident of the county where the offense is committed, the sheriff, constable, or police officer is deemed guilty of nonfeasance in office and upon conviction shall be fined in any sum not more than five hundred dollars (\$500) and shall be removed from office.

History. Acts 1907, No. 55, §§ 1-4, p. 134; C. & M. Dig., §§ 2669-2672; Pope's Dig., §§ 3355-3358; A.S.A. 1947, §§ 41-3278 — 41-3281.

Cross References. Arkansas Horse Racing Law, inconsistent statutes inapplicable, § 23-110-102.

CASE NOTES

ANALYSIS

Applicability.

Betting.

Common-law nuisances.

Gambling house.

Instruction.

Successive offenses.

Applicability.

This section is not applicable to dog races. *Fox v. Harrison*, 178 Ark. 1189, 13 S.W.2d 808 (1929).

Betting.

The agreement between parties that the loser pay the winner as a result of their wager, brings the transaction within the prohibition of this section, and it is not necessary that money be put up. *Wolf v. State*, 135 Ark. 574, 206 S.W. 39 (1918).

Common-Law Nuisances.

Although persons who maintain a place for betting on horse races may be prosecuted under this section and § 5-66-103, they might also be prosecuted for maintaining a common-law nuisance. *Blumensteil v. State*, 148 Ark. 421, 230 S.W. 262 (1921).

Gambling House.

An establishment maintained for the purpose of receiving and making bets on horse races is a gambling house. *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1944).

Instruction.

Refusal to give instruction defining the offense covered by this section as lesser included offense of the crime defined by § 5-66-103, where there was no evidence which would have supported a conviction

under this section held proper. *Blankenship v. State*, 258 Ark. 535, 527 S.W.2d 636 (1975).

Successive Offenses.

One may be punished for a second offense though the conviction for the first

offense did not occur within one year before the return of the indictment for the second offense. *Wolf v. State*, 135 Ark. 574, 206 S.W. 39 (1918).

Cited: *Western Union Tel. Co. v. Estes*, 213 Ark. 719, 212 S.W.2d 333 (1948).

5-66-117. Horseracing — Agency service wagering.

(a) Any person who, either for himself or herself or as agent or employee of another, places, offers, or agrees to place, either in person or by messenger, telephone, or telegraph, a wager on behalf of another person, for a consideration paid or to be paid by or on behalf of the other person, on a thoroughbred horse race being conducted in or out of this state is deemed guilty of a Class D felony.

(b) It is a defense to prosecution under this section if a defendant can prove that his or her wager on behalf of another person was:

- (1) Of a casual nature with no profit motive; and
- (2) Merely an accommodation to the other person.

History. Acts 1977, No. 791, §§ 1, 2;
A.S.A. 1947, §§ 41-3203, 41-3204.

CASE NOTES

Cited: *Post v. Harper*, 980 F.2d 491 (8th Cir. 1992).

5-66-118. Lottery, etc. — Tickets.

(a) It is unlawful for any person to:

(1) Keep an office, room, or place for the sale or disposition of a lottery, policy, and gift concert ticket or slip or like device;

(2) Vend, sell, or otherwise dispose of any lottery, policy, or gift concert ticket, slip, or like device;

(3) Possess any lottery, policy, or gift concert ticket, slip or like device, except a lottery ticket issued in another state where a lottery is legal; or

(4) Be interested either directly or indirectly in the sale or disposition of any lottery, policy, or gift concert ticket, slip or like device.

(b) In any prosecution or investigation under this section, it is no exemption for a witness that his or her testimony may incriminate himself or herself, but no such testimony given by the witness shall be used against him or her in any prosecution except for perjury, and the witness is discharged from liability for any violation of the law upon his or her part disclosed by his or her testimony.

(c)(1) The General Assembly recognizes that:

(A) The present laws relating to lotteries are vague in certain areas and, although designed to prohibit the operation of lotteries in the state, may be interpreted to prohibit even the printing of lottery

tickets by companies in this state for distribution in other states where lotteries are legal;

(B) There are companies in this state that print various types of tickets, stamps, tags, coupon books, and similar devices and that may be interested in printing lottery tickets for states where lotteries are lawful; and

(C) It is the intent and purpose of this subsection to clarify the present law relating to lotteries to specifically permit businesses in Arkansas to print lottery tickets for use in states where lotteries are lawful.

(2)(A) The printing or other production of lottery tickets by a business located in Arkansas for use in a state where a lottery is permitted is declared to be lawful.

(B) Nothing contained in this section and § 5-66-119 or any other law shall be construed to make printing or production of lottery tickets described in subdivision (c)(2)(A) of this section unlawful.

(d) Any person who violates any provision of this section is guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

History. Acts 1939, No. 209, §§ 1-6; A.S.A. 1947, §§ 41-3272 — 41-3277; Acts 1987, No. 835, §§ 1, 2; 1993, No. 1053, § 1.

Publisher's Notes. Acts 1987, No. 835, §§ 1, 2 is also codified at § 5-66-119.

Cross References. Lotteries prohibited, Ark. Const., Art. 19, § 14.

RESEARCH REFERENCES

Ark. L. Rev. Criminal Law — Lotteries
— Consideration Necessary to Constitute,
10 Ark. L. Rev. 223.

CASE NOTES

Lottery.

A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize. *Burks v. Harris*, 91 Ark. 205, 120 S.W. 979 (1909) (decision under prior law).

Where a newspaper manager purchased an automobile under a conditional agreement, reserving title in the vendor, the fact that the vendor knew that the purchaser intended to give the machine away in a popularity contest (conceding that such contest was in effect a lottery) did not affect the validity of the contract of

sale. *Watkins v. Curry*, 103 Ark. 414, 147 S.W. 43 (1912) (decision under prior law).

A popularity contest, with no element of chance in it, is not illegal as a lottery. *Millsaps v. Urban*, 116 Ark. 90, 171 S.W. 1198 (1914) (decision under prior law).

Buying a chance for valuable consideration paid or to be paid to obtain a possible prize is a lottery even though limited to members of an alleged charitable organization and although some of the money goes to charity. *State v. Bass*, 224 Ark. 976, 277 S.W.2d 479 (1955).

Cited: *In re Armstrong*, 217 Bankr. 569 (Bankr. E.D. Ark. 1998).

5-66-119. Lottery — Promotion through sales.

(a)(1) Any person who in this state, directly or indirectly, sets up, promotes, engages in, or in any manner participates in any plan, scheme, device, or other means, either alone or in concert with any other person, firm, or corporation, either within or without the State of Arkansas, in which goods, property, or any other thing of value is sold to any person, firm, or corporation for any consideration, either cash or otherwise, and upon the further consideration that the purchaser agrees to obtain one (1) or more persons to participate in the plan, scheme, device, or other means by making a similar purchase and a similar agreement to secure one (1) or more other persons to participate in the plan, scheme, device, or other means in the same manner, each purchaser being given the right to obtain money, credits, goods, or some other thing of value, depending upon the number of persons joining in or participating in the plan, scheme, device, or other means, is declared to have set up, promoted, engaged in, or participated in a lottery, which is declared to be unlawful.

(2) The promotion, engaging in, or participation in the plan, scheme, device, or other means described in subdivision (a)(1) of this section is punishable as provided in this section.

(b)(1) Upon a complaint filed by any interested person, on relation of the State of Arkansas, the Attorney General, or any prosecuting attorney of any county where a plan, scheme, device, or other means described in subdivision (a)(1) of this section is proposed, promoted, operated, engaged in, or participated in, the circuit court of the county where the plan, scheme, device, or other means described in subdivision (a)(1) of this section is set up, proposed, operated, promoted, engaged in, or participated in may enjoin the further operation, promotion of, engagement, or participation in the plan, scheme, device, or other means.

(2) Any injunction under subdivision (b)(1) of this section may be granted without bond furnished by the plaintiff, and the circuit court may make further orders touching upon the subject matter as it may find necessary and desirable.

(c)(1) The General Assembly recognizes that:

(A) The present laws relating to lotteries are vague in certain areas and, although designed to prohibit the operation of lotteries in the state, may be interpreted to prohibit even the printing of lottery tickets by companies in this state for distribution in other states where lotteries are legal;

(B) There are companies in this state that print various types of tickets, stamps, tags, coupon books, and similar devices and that may be interested in printing lottery tickets for states where lotteries are lawful; and

(C) It is the intent and purpose of this subsection to clarify the present law relating to lotteries to specifically permit businesses in Arkansas to print lottery tickets for use in states where lotteries are lawful.

- (2)(A) The printing or other production of lottery tickets by a business located in Arkansas for use in a state where a lottery is permitted is declared to be lawful.
- (B) Nothing contained in this section and § 5-66-119 or any other law shall be construed to make printing or production of lottery tickets described in subdivision (c)(2)(A) of this section unlawful.
- (d) Any person who violates a provision of this section commits a Class D felony.

History. Acts 1961, No. 49, §§ 1-3; 1975, No. 928, § 10; A.S.A. 1947, §§ 41-3285 — 41-3287; Acts 1987, No. 835, §§ 1, 2.

Publisher's Notes. Acts 1987, No. 835, §§ 1, 2 is also codified at § 5-66-118.

RESEARCH REFERENCES

Ark. L. Rev. Kindt, Legalized Gambling Activities as Subsidized by Taxpayers, 48 Ark. L. Rev. 889.

CHAPTER 67

HIGHWAYS AND BRIDGES

SECTION.	SECTION.
5-67-101. Advertising signs generally.	5-67-105. Wreckage near memorial highway.
5-67-102. False or misleading signs.	5-67-106. Use of spotlight.
5-67-103. Attaching signs to utility poles or living plants.	5-67-107. Solicitation on or near a highway.
5-67-104. Violation of posted bridge prohibitions.	

Effective Dates. Acts 1925, No. 135, § 5: approved Mar. 5, 1925. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared and the same shall take effect and be in force from and after its passage."

Acts 1971, No. 249, § 6: Mar. 9, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that there is an immediate need to control the widening gap between highway needs and highway revenues in Arkansas, which is a matter of grave concern to the General Assembly, and that by the immediate passage of this Act significant efforts to conserve those revenues and to retard the accrual of needs may be realized. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

5-67-101. Advertising signs generally.

- (a) It is unlawful for any person, firm, or corporation to place any advertising sign on the highway right-of-way in this state, except for a sign placed under direction of the State Highway Commission.

(b) Any person violating a provision of this section or § 5-39-213 is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

History. Acts 1941, No. 359, §§ 2, 3; A.S.A. 1947, §§ 41-3355, 41-3356; Acts 2005, No. 1994, § 54.

Publisher's Notes. Acts 1941, No. 359, § 3, is also codified as § 5-39-213(b).

Amendments. The 2005 amendment substituted "violation" for "misdemeanor" in (b).

Cross References. Placing advertising on private property without owner's written permission, § 5-39-213.

Regulation of outdoor advertising, § 27-74-101 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Legal Control of Business in Arkansas, 5 Ark. L. Rev. 137.

Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

5-67-102. False or misleading signs.

(a) It is unlawful for any person, firm, or corporation to erect or cause to be erected or maintained on or within one hundred yards (100 yds.) of the right-of-way of any state highway any sign or billboard that has printed, painted, or otherwise placed on the sign or billboard words or figures:

(1) Calculated to cause the traveling public of this state or tourists from other states to abandon the state highway and travel any public road to any town, city, or destination in this state unless the sign or billboard is erected and maintained by and with the consent and approval of the State Highway Commission; or

(2) That give to the traveling public any false or misleading information pertaining to the highways of this state.

(b) Any person, firm, or corporation violating a provisions of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

(c) The commission shall cause the removal and destruction of, and it is made the duty of the commission to remove and destroy, any signboard now on or within one hundred yards (100 yds.) of the right-of-way of any state highway that gives to the traveling public any false and misleading information pertaining to the highways of this state.

History. Acts 1925, No. 135, §§ 1-4; Pope's Dig., §§ 3660-3663; A.S.A. 1947, §§ 41-3351 — 41-3354; Acts 2005, No. 1994, § 54.

Amendments. The 2005 amendment

substituted "violation" for "misdemeanor" in (c).

Cross References. Regulation of outdoor advertising, limitations, § 27-74-302.

RESEARCH REFERENCES

Ark. L. Rev. Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

5-67-103. Attaching signs to utility poles or living plants.

(a)(1) It is unlawful for any person, firm, corporation, or association to nail, staple, or otherwise attach or cause to be nailed, stapled, or otherwise attached any sign, poster, or billboard to any public utility pole or to any living tree, shrub, or other plant located upon the rights-of-way of any public road, highway, or street in this state.

(2) However, this prohibition does not apply to a warning, safety, or identification sign attached to a public utility pole by a utility company or cooperative.

(b)(1) Any person, firm, corporation, or association violating a provision of this section is guilty of a violation and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

(2) Each day that any violation under subdivision (b)(1) of this section continues constitutes a separate offense.

History. Acts 1967, No. 420, §§ 1, 2; A.S.A. 1947, §§ 41-3362, 41-3363; Acts 2005, No. 1994, § 54.

Amendments. The 2005 amendment substituted “violation” for “misdemeanor” in present (b)(1).

5-67-104. Violation of posted bridge prohibitions.

(a) It is unlawful for any person owning or operating a motor vehicle that in any way exceeds or violates any properly posted limitation, regulation, or restriction governing the use of a bridge structure to use the bridge structure so long as the use violates any posted prohibition.

(b)(1) Any unlawful action resulting in a violation of a provision of subsection (a) of this section is a violation and upon conviction the person shall be punished by a fine of not more than two hundred dollars (\$200).

(2) The person is liable for the costs to restore the damage and injury to the bridge structure occasioned by the violation.

History. Acts 1971, No. 249, §§ 2, 3; A.S.A. 1947, §§ 41-3365, 41-3366; Acts 2005, No. 1994, § 54.

Amendments. The 2005 amendment substituted “violation” for “misdemeanor” in present (b)(1).

5-67-105. Wreckage near memorial highway.

(a) If any person or corporation store’s wrecked, worn out, or discarded automobiles or other scrap iron or steel within two hundred yards (200 yds.) of any public highway in the State of Arkansas, a part of which has been or may be designated by law as a memorial highway, it is the person’s or corporation’s duty to:

(1) Construct a solid fence or wall high enough to hide the wrecked, worn out, or discarded automobiles or other scrap iron or steel from a person passing along the memorial highway; or

(2) Hide the wrecked, worn out, or discarded automobiles or other scrap iron or steel behind a house or other structure or elevation of the land that conceals the wrecked, worn out, or discarded automobiles or other scrap iron or steel from public view of a person passing along the memorial highway.

(b) Any person failing to comply with a provision of this section is guilty of a violation and shall be fined five dollars (\$5.00) for each day that he or she fails to comply, with the fine to go to the local school district where the site of the violation is located.

History. Acts 1933, No. 165, §§ 1, 2; Pope's Dig., §§ 3657, 3658; A.S.A. 1947, §§ 41-3357, 41-3358; Acts 1997, No. 379, § 1; 2005, No. 1994, § 54.

Amendments. The 2005 amendment

substituted "the person's or corporation's" for "his or its" in (a); and, in (b), inserted "is guilty of a violation and" and "or she."

Cross References. Junkyard control, § 27-74-401 et seq.

5-67-106. Use of spotlight.

(a) It is unlawful to use a spotlight from any public road, street, or highway except for use by:

(1) A law enforcement officer, game and fish officer, emergency service worker, or utility company employee in the performance of his or her duties;

(2) A person or his or her employee to examine real or personal property or livestock owned or rented by the person; or

(3) A person to assist in the repair or removal of a motor vehicle or other property.

(b) This section does not apply within the boundaries of a city of the first class or a city of the second class.

(c) A violation of this section is a Class C misdemeanor.

History. Acts 1987, No. 625, § 1.

5-67-107. Solicitation on or near a highway.

(a) It is unlawful for any person to solicit a donation or offer to sell any item or service:

(1) On a state highway;

(2) Within ten feet (10') of a state highway, if there is not a sidewalk along the highway; or

(3) Between the highway and a sidewalk, if there is a sidewalk within ten feet (10') of the highway.

(b) A violation of this section is a Class C misdemeanor.

History. Acts 1993, No. 980, § 1.

CHAPTER 68
OBSCENITY

SUBCHAPTER.

- 1. GENERAL PROVISIONS. [RESERVED.]
- 2. OFFENSES GENERALLY.
- 3. STATE STANDARDS DEFINING AND REGULATING OBSCENITY.
- 4. ARKANSAS LAW ON OBSCENITY.
- 5. SELLING OR LOANING PORNOGRAPHY TO MINORS.

RESEARCH REFERENCES

ALR. Validity of ordinances restricting location of “adult entertainment” or sex-oriented businesses, 10 ALR 5th 538.

Statute or ordinance prohibiting use of “obscene” language in public. 2 ALR 4th 1331.

Jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state. 16 ALR 4th 1318.

Processor’s right to refuse to process or return film or videotape of obscene subject. 18 ALR 4th 1326.

Statute authorizing forfeiture of use or

closure of real property from which obscene materials have been disseminated or exhibited. 25 ALR 4th 395.

Am. Jur. 50 Am. Jur. 2d, Lewdness, § 3 et seq.

Ark. L. Rev. Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155.

Constitutional Law: Captivity of an Audience Viewing Screen of Drive-In Theater Outside of Premises, 30 Ark. L. Rev. 82.

The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

C.J.S. 67 C.J.S., Obscenity, § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-68-201. Exhibition of obscene figures.
- 5-68-202. Sale or possession of literature rejected by U.S. mail.

SECTION.

- 5-68-203. Obscene films.
- 5-68-204. Nudism.
- 5-68-205. Public display of obscenity.

Preambles. Acts 1931, No. 155, contained a preamble which read: “Whereas, there is, at this time, being offered for sale in numerous places within the State of Arkansas various forms and classes of magazines, papers, and literature which are grossly obscene, and

“Whereas, owing to its obscene and immoral nature, much of this literature is not permitted by the Federal Government to be sent through the United States mails

but is shipped into the State of Arkansas by express companies and by motor vehicle carriers;

“Now, therefore ...”

Effective Dates. Acts 1931, No. 155, § 3: Mar. 20, 1931.

Acts 1957, No. 38, § 5: Feb. 13, 1957. Emergency clause provided: “It is hereby determined by the General Assembly of the State of Arkansas that there has grown up in various parts of the nation

and in the State of Arkansas a form of recreation or participation known as nudism which entails such practices as sunbathing, hiking, swimming, and other activities in the nude and in the presence of persons of the opposite sex. It is further determined that such forms of recreation, participation, activities and practices constitute a clear and present danger to the

public peace, health, welfare, safety and morals of the State of Arkansas, and this Act is necessary for the preservation of the public peace, health, welfare, safety and morals. An emergency is, therefore, declared to exist and this Act shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

5-68-201. Exhibition of obscene figures.

(a) Any person publicly exhibiting any obscene figure is guilty of a violation.

(b) Any person convicted under a provision of this section shall be fined in any sum not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).

History. Rev. Stat., ch. 44, div. 6, art. 2, §§ 2, 3; C. & M. Dig., §§ 2700, 2701; Pope's Dig., §§ 3386, 3387; A.S.A. 1947, §§ 41-3551, 41-3552; Acts 2005, No. 1994, § 184.

Amendments. The 2005 amendment substituted "guilty of a violation" for "deemed guilty of a misdemeanor" in (a); and inserted "nor more than one hundred dollars (\$100)" in (b).

CASE NOTES

Jury Question.

Question of obscenity must be submitted to the jury as a question of fact and the finding of the court, sitting as a jury, may not be disturbed if sustained by testimony sufficient to support that conclusion by an

ordinary man of average intelligence. *Hadley v. State*, 205 Ark. 1027, 172 S.W.2d 237 (1943).

Cited: *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973).

5-68-202. Sale or possession of literature rejected by U.S. mail.

(a) It is unlawful for any person, firm, or corporation to sell or to offer for sale or to have in possession any magazine, paper, or other literature or printed book, picture, or matter the shipment or transportation of which has been refused and rejected from the United States mail or which literature or literature of like character the United States Government does not permit to be sold, shipped, or handled.

(b)(1) Any violation of a provision of this section constitutes a violation and upon conviction the offender is subject to a fine of any sum not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).

(2) Each day that this section is violated constitutes a separate offense.

History. Acts 1931, No. 155, §§ 1, 2; Pope’s Dig., §§ 3381, 3382; A.S.A. 1947, §§ 41-3556, 41-3557; Acts 2005, No. 1994, § 55.

Amendments. The 2005 amendment substituted “violation” for “misdemeanor” in present (b)(1).

5-68-203. Obscene films.

(a) It is unlawful for any person to knowingly exhibit, sell, offer to sell, give away, circulate, produce, distribute, attempt to distribute, or have in his or her possession any obscene film.

(b) As used in this section:

(1) “Film” means motion picture film, still picture film, slides, and movie film of any type;

(2) “Obscene” means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest; and

(3) “Person” means any individual, partnership, firm, association, club, corporation, or other legal entity.

(c)(1) Any person that knowingly exhibits, sells, offers to sell, gives away, circulates, produces, distributes, or attempts to distribute any obscene film is guilty of a Class D felony.

(2) Any person that has in his or her possession an obscene film is guilty of a Class A misdemeanor.

History. Acts 1967, No. 411, §§ 1-3; A.S.A. 1947, §§ 41-3578 — 41-3580; Acts 2005, No. 1994, § 429.

Publisher’s Notes. This section may be impliedly repealed by §§ 5-68-301 — 5-68-308.

Amendments. The 2005 amendment inserted “or her” in (a) and (c); and, in (c), substituted “Class D felony” for “felony and upon conviction shall be fined not

more than two thousand dollars (\$2,000) or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned,” and substituted “Class A misdemeanor” for “misdemeanor and upon conviction shall be fined not more than one thousand dollars (\$1,000) or be imprisoned in the county jail for a period not to exceed one (1) year, or both.”

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

Jans, Survey of Constitutional Law, 3 UALR L.J. 184.

DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

CASE NOTES

ANALYSIS	Knowledge.
Constitutionality.	Constitutionality.
Exhibition, sale, etc.	It was not essential that a statute incorporate every nuance of constitutional dic-
Implied repeal.	

tum and this section were not unconstitutional under the First Amendment of the U.S. Constitution for failing to include in the definition of obscene the requirement that the film be utterly without redeeming social value. *Bullard v. State*, 252 Ark. 806, 481 S.W.2d 363 (1972).

This section is a valid constitutional regulation of obscene films when limited to that which constituted (a) patently offensive representations or descriptions of ultimate sexual acts whether normal, perverted, actual or simulated and (b) patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals. *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974).

This section is not unconstitutional because it does not contain a provision that alleged obscene material may be redeemed because of any measure of social value. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974), cert. denied, 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975).

This section is not unconstitutional because it does not on its face limit the area of proscribed material to offensive depictions of sexual conduct or because the only standard prescribed is whether the material appeals to prurient interest. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974), cert. denied, 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975).

Where theater operators had been warned by a judge that a film might be obscene, conviction under this section for exhibition of the film, subsequent to the U.S. Supreme Court *Miller* decision (*Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), reh. den. 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128 (1973)) and prior to the upholding by the state Supreme Court of this section under the standards set forth in the *Miller* decision, was not an ex post facto application of law as the theater operators had ample warning that the showing of the film could be viewed as a violation of the state obscenity statute. *Herman v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974), cert. denied, 420 U.S. 953, 95 S. Ct. 1337, 43 L. Ed. 2d 431 (1975).

This section is not unconstitutionally vague in violation of due process. *Smith v. State*, 258 Ark. 549, 528 S.W.2d 360

(1975); *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

Since that part of this section declaring possession of obscene films to be a misdemeanor, is separable from the other part which declares prohibited acts to be felonies, the misdemeanor provision does not affect the constitutionality of the felony provisions. *Smith v. State*, 258 Ark. 549, 528 S.W.2d 360 (1975); *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

The state's attempt to make mere private possession of obscene material a crime is an unconstitutional invasion of that person's First Amendment rights. *Buck v. State*, 265 Ark. 434, 578 S.W.2d 579 (1979).

Exhibition, Sale, Etc.

Showing an obscene film without charge or compensation is a violation of the laws of this state. *Buck v. Steel*, 263 Ark. 249, 564 S.W.2d 215 (1978).

Defendant who sold obscene films was improperly charged under this section. *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).

Implied Repeal.

The chancery court had no jurisdiction under this section because the section is exclusively of a criminal nature and contains no reference to any civil remedy. *Southland Theaters, Inc. v. State ex rel. Tucker*, 254 Ark. 192, 492 S.W.2d 421 (1973).

For cases discussing the implied repeal of this section by Acts 1977, No. 464 (repealed), see *Buck v. Steel*, 263 Ark. 249, 564 S.W.2d 215 (1978); *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).

Knowledge.

Where there was no evidence from which the jury could have found, without resorting to surmise and conjecture, that the defendant had knowledge that the film sold was an obscene film, as required for conviction, the trial court erred in denying the defendant's motion for directed verdict at the conclusion of the state's case. *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

To sustain a conviction under this section, scienter requires more than a mere belief which warrants further inspection or inquiry. *Fortner v. State*, 258 Ark. 591, 528 S.W.2d 378 (1975).

Cited: *Southland Theaters, Inc. v. State ex rel. Tucker*, 254 Ark. 639, 495 S.W.2d 148 (1973).

5-68-204. Nudism.

(a) As used in this section, "nudism" means the act or acts of a person or persons congregating or gathering with his, her, or their private parts exposed in the presence of one (1) or more persons of the opposite sex as a form of social practice.

(b) The provisions of this section do not apply to the enumerated acts if:

(1) The purpose of the person committing the act or acts is to render medical or surgical treatment or to determine the need for medical or surgical treatment or to cleanse such sexual part, and the person committing the act:

(A) Is a licensed physician, as defined by § 17-80-101, or any such physician of a sister state making a professional call into Arkansas;

(B) Committed the act under the professional direction of any physician described in subdivision (b)(1)(A) of this section; or

(C) Is a nurse duly registered or licensed by the Arkansas State Board of Nursing; or

(2) The persons are married legally one to another.

(c) It is unlawful for any:

(1) Person, club, camp, corporation, partnership, association, or organization to advocate, demonstrate, or promote nudism; or

(2) Person to rent, lease, or otherwise permit his or her land, premises, or buildings to be used for the purpose of advocating, demonstrating, or promoting nudism.

(d) Any person, club, camp, corporation, partnership, association, or organization violating any provision of this section is guilty of a Class A misdemeanor for each offense.

(e) This section does not repeal any existing laws of the State of Arkansas except those in direct conflict with this section but this section is cumulative to the existing laws of the State of Arkansas.

History. Acts 1957, No. 38, §§ 1-4; A.S.A. 1947, §§ 41-3558 — 41-3561; Acts 2005, No. 1994, § 351.

Amendments. The 2005 amendment inserted "or her" in (c); and, in (d), substituted "Class A misdemeanor for each offense" for "misdemeanor and upon con-

viction shall be fined in any sum not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000) or imprisoned for not less than thirty (30) days nor more than six (6) months, or both such fine and imprisonment for each offense."

CASE NOTES

Advocacy, Demonstration, Etc.

Showing by theatre owner of film depicting nude persons did not constitute

advocacy of nudism. *Mini-Art Operating Co. v. State*, 253 Ark. 364, 486 S.W.2d 8 (1972).

5-68-205. Public display of obscenity.

(a)(1) As used in this subsection:

(A) "Obscene" means the same as it is defined by § 5-68-302; and

(B) "Obscenity" means an obscene sticker, painting, decal, emblem, or other device that is or contains an obscene writing, description, photograph, or depiction.

(2) A person commits the offense of publicly displaying an obscenity if the person knowingly causes an obscenity to be displayed in a manner that is readily visible to the public and the obscenity's content or character is distinguishable by normal vision.

(3) Publicly displaying an obscenity is a Class B misdemeanor.

(b)(1) It is unlawful to publicly display obscene material as defined by § 5-68-302 on any motor vehicle or wearing apparel.

(2) A violation of this subsection is punishable as a Class C misdemeanor.

History. Acts 1989, No. 200, § 1; 1989, No. 584, § 1.

A.C.R.C. Notes. Section 5-68-302, referred to in subdivision (a)(1)(A) of this

section, does not define the term "obscene." However, § 5-68-302 does define the terms "obscene material" and "obscene performance."

RESEARCH REFERENCES

Ark. L. Rev. The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

SUBCHAPTER 3 — STATE STANDARDS DEFINING AND REGULATING OBSCENITY

SECTION.

5-68-301. Legislative declaration.

5-68-302. Definitions.

5-68-303. Promoting obscene materials.

5-68-304. Promoting obscene performance.

5-68-305. Obscene performance at a live public show.

SECTION.

5-68-306. Publicly displaying obscene material for advertising purposes.

5-68-307. Public display of hard-core sexual conduct.

5-68-308. Defenses.

Cross References. Sexual exploitation of children generally, § 5-27-301 et seq.

Use of children in sexual performances, § 5-27-401 et seq.

Effective Dates. Acts 1981 (Ex. Sess.), No. 28, § 11: Dec. 1, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the prompt and efficient ad-

ministration of justice in the State of Arkansas has been hindered by the existence of conflicting legislation on the topic of obscenity. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

5-68-301. Legislative declaration.

(a) The General Assembly finds and declares that:

(1) The definition and regulation of obscenity are matters of statewide concern;

(2) In defining and regulating obscenity, a statewide standard is workable; and

(3) There is a need for clarification of the applicable law relating to the definition and regulation of obscenity.

(b)(1) To this end, it is the intent of this subchapter to impose a statewide standard for the definition and regulation of obscenity that is applicable throughout the state and all political subdivisions.

(2) No political subdivision shall enact any ordinance, rule, or regulation in conflict with a provision of this subchapter.

History. Acts 1981 (Ex. Sess.), No. 28,
§ 1; A.S.A. 1947, § 41-3585.

CASE NOTES

Cited: *Marjak, Inc. v. Cowling*, 626 F. Supp. 522 (W.D. Ark. 1985).

5-68-302. Definitions.

As used in this subchapter:

(1) "Advertising purposes" means a purpose of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment;

(2) "Hard-core sexual conduct" means a patently offensive act, exhibition, representation, depiction, or description of:

(A) An intrusion, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal opening of any person's body; or

(B) Cunnilingus, fellatio, anilingus, bestiality, a lewd exhibition of genitals, or an excretory function, actual or simulated;

(3) "Live public show" means a public show in which a human being, an animal, or both appear bodily before a spectator or customer;

(4) "Obscene material" means a material that:

(A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or scientific value;

(5) "Obscene performance" means a play, motion picture, dance, show, or other presentation, whether pictured, animated, or live, performed before an audience and that in whole or in part depicts, or reveals, sexual conduct, hard-core sexual conduct, or sadomasochistic

abuse, or that includes an explicit verbal description or a narrative account of sexual conduct or hard-core sexual conduct, and that:

(A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or scientific value;

(6) "Promote" means to produce, direct, perform in, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, or advertise, for consideration, or to offer or agree to do any of these things for consideration;

(7) "Public show" means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, regardless of whether an admission or other charge is levied or collected and regardless of whether a minor is admitted or excluded;

(8) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in an undergarment or in revealing or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of a person so clothed, in a sexual context; and

(9) "Sexual conduct" means human masturbation or sexual intercourse.

History. Acts 1981 (Ex. Sess.), No. 28,
§ 2; A.S.A. 1947, § 41-3585.1.

CASE NOTES

ANALYSIS

Constitutionality.

Hard-core sexual conduct.

Obscene material.

—In general.

—"Appeals."

—Statewide standards.

Constitutionality.

This section is not void for vagueness. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Hard-Core Sexual Conduct.

Described activities held to meet the statutory definition of former law for "hard-core sexual conduct." *Century Theaters, Inc. v. State*, 274 Ark. 484, 625 S.W.2d 511 (1981) (decision under prior law).

Obscene Material.

—In General.

Under former law, a judge's preliminary determination, prior to issuance of search warrant, that films of hard-core sexual conduct appealed to the prurient interest of the average person, applying contemporary statewide standards, and lacked serious literary, artistic, political, or scientific value was warranted where the judge knew that the place to be searched was a theater wherein movies were being shown to patrons in individual booths and where testimony of detectives describing the films indicated that the films would appeal to the prurient interests of the average person and that there was little probability of the films containing anything of value. *Century Theaters, Inc. v. State*, 274 Ark. 484, 625 S.W.2d 511 (1981) (decision under prior law).

This section does not use circular definition which ordinary persons cannot understand in defining "obscene material." *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Allegedly obscene material must be judged basis of a community standard encompassing all levels of sensitivity, of religiousness, and of economic, educational, and social standings. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Obscene material is that which, taken as a whole and applying contemporary statewide standards, attempts to activate prurient interest; the average person is quite capable of making that determination, and whether or not the material is successful in doing so is beside the point. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Evidence of pandering to prurient interests in the creation, promotion, or dissemination of the material is relevant in determining whether the material is

obscene. *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989).

—“Appeals.”

Legislature intended for the word “appeals” in subdivision (4)(B) to mean (1) an earnest or urgent request, entreaty, or supplication; (2) a resort or application to some higher authority, as for sanction, corroboration, or decision; (3) the power of attracting or of arousing interest. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

—Statewide Standards.

Survey of several establishments selling obscene materials in state’s most urban area would not be representative of a statewide standard, as is required by subdivision (4)(B). *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed. 2d 111 (1987).

Cited: 4000 *Asher, Inc. v. State*, 290 Ark. 8, 716 S.W.2d 190 (1986); *Dunlap v. State*, 303 Ark. 222, 795 S.W.2d 920 (1990).

5-68-303. Promoting obscene materials.

(a) Except as otherwise provided in § 5-68-308, a person commits promoting obscene materials if he or she knowingly promotes, or has in his or her possession with intent to promote, any obscene material.

(b) As used in this section, “material” means any writing, picture, motion picture, film, slide, drawing, or other visual reproduction.

(c) Promoting obscene materials is a Class D felony.

History. Acts 1981 (Ex. Sess.), No. 28, § 3; A.S.A. 1947, § 41-3585.2.

RESEARCH REFERENCES

ALR. Constitutionality of state statutes banning distribution of sexual devices. 94 ALR 5th 497.

CASE NOTES

ANALYSIS

Construction.
Evidence.
Search and seizure.

Construction.

Former law which prohibited the show-

ing of an obscene film for compensation but did not prohibit such a showing for free, did not repeal, either expressly or by implication, § 5-68-203 et seq., which prohibits the showing of any obscene film, regardless of compensation inasmuch as the two acts are not in direct conflict. Buck

v. Steel, 263 Ark. 249, 564 S.W.2d 215 (1978) (decision under prior law).

Evidence.

Evidence was sufficient to sustain conviction. *Dunlap v. State*, 303 Ark. 222, 795 S.W.2d 920 (1990), cert. denied, 498 U.S. 1121, 111 S. Ct. 1076, 112 L. Ed. 2d 1181 (1991).

Search and Seizure.

Where the articles were offered for public sale by the bookstore, and the officers

walked in and bought them, there was no violation of the prohibition against unreasonable searches and seizures, and the defendant, an employee of the bookstore, could be arrested without a prior judicial determination of obscenity. *4000 Asher, Inc. v. State*, 290 Ark. 8, 716 S.W.2d 190 (1986).

Cited: *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155 (1987); *Oglesby v. State*, 299 Ark. 403, 773 S.W.2d 443 (1989).

5-68-304. Promoting obscene performance.

(a) A person commits promoting an obscene performance if he or she knowingly:

(1) Directs, manages, finances, or presents an obscene performance;
or

(2) Promotes any obscene performance, as owner, producer, director, manager, or performer.

(b) Promoting an obscene performance is a Class D felony.

History. Acts 1981 (Ex. Sess.), No. 28, § 4; A.S.A. 1947, § 41-3585.3.

5-68-305. Obscene performance at a live public show.

(a) A person commits an obscene performance at a live public show if he or she knowingly:

(1) Engages in an obscene performance of sadomasochistic abuse, hard-core sexual conduct, or sexual conduct in a live public show; or

(2) Directs, manages, finances, or presents an obscene performance at a live public show in which a participant engages in sadomasochistic abuse, hard-core sexual conduct, or sexual conduct.

(b) Committing an obscene performance at a live public show is a Class C felony.

History. Acts 1981 (Ex. Sess.), No. 28, § 5; A.S.A. 1947, § 41-3585.4.

5-68-306. Publicly displaying obscene material for advertising purposes.

(a) Except as otherwise provided in § 5-68-308, a person commits publicly displaying obscene material for advertising purposes if, for advertising purposes, he or she knowingly:

(1) Displays publicly or causes to be displayed publicly obscene material; or

(2) Permits any display of obscene material on premises owned, rented, or operated by him or her.

(b) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or

private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare or a vehicle on a public thoroughfare.

(c) Publicly displaying obscene material for advertising purposes is a Class B misdemeanor.

(d) In any prosecution for violation of this section, it is an affirmative defense for the defendant to prove that the public display was:

(1) Primarily for artistic purposes or as a public service even though in connection with a commercial venture; or

(2) Of nudity, exhibited by a bona fide art, antique, or similar gallery or exhibition and visible in a normal display setting.

History. Acts 1981 (Ex. Sess.), No. 28, § 6; A.S.A. 1947, § 41-3585.5.

RESEARCH REFERENCES

ALR. Constitutionality of state statutes banning distribution of sexual devices. 94 ALR 5th 497.

5-68-307. Public display of hard-core sexual conduct.

(a) A person commits a public display of hard-core sexual conduct if he or she knowingly engages in hard-core sexual conduct in an open public place.

(b) Engaging in hard-core sexual conduct in an open public place is a Class D felony.

History. Acts 1981 (Ex. Sess.), No. 28, § 7; A.S.A. 1947, § 41-3585.6.

RESEARCH REFERENCES

ALR. What constitutes “public place” within meaning of state statute or local ordinance prohibiting indecency or com- mission of sexual act in public place. 95 ALR 5th 229.

5-68-308. Defenses.

(a) No employee is liable to prosecution under this subchapter for promoting or possessing with intent to promote any obscene motion picture if the employee is acting within the scope of his or her regular employment.

(b)(1) As used in subsection (a) of this section, “employee” means any person regularly employed by an owner or operator of a motion picture theater if the person:

(A) Has no financial interest other than salary or wages in the ownership or operation of the motion picture theater;

(B) Has no financial interest in or control over the selection of a motion picture shown in the theater; and

(C) Is working within the motion picture theater where he or she is regularly employed.

(2) However, "employee" does not include a manager of a motion picture theater.

(c) No employee, director, or trustee of a bona fide school, museum, or public library, acting within the scope of his or her regular employment, is liable to prosecution for a violation of this subchapter for disseminating a writing, film, slide, drawing, or other visual reproduction that is claimed to be obscene.

History. Acts 1981 (Ex. Sess.), No. 28, § 8; A.S.A. 1947, § 41-3585.7.

CASE NOTES

ANALYSIS

Constitutionality.

Bona fide school, museum, or public library.

Constitutionality.

Subsection (c) of this section does not deny equal protection because bookstore employees do not enjoy the same immunity from prosecution that is granted to the employees of schools, museums, and libraries. 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190 (1986).

The statutory exemption under subsections (a) and (b) of this section in favor of theater employees is valid and does not

violate the equal protection clause even though employees of bookstores are not exempted. 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190 (1986).

Bona Fide School, Museum, or Public Library.

The settled meaning of "bona fide" as synonymous with its literal translation, "good faith," is so familiar that the average person could not be misled; therefore, subsection (c) of this section is not overbroad because the exact meaning of bona fide is not given. 4000 Asher, Inc. v. State, 290 Ark. 8, 716 S.W.2d 190 (1986).

Cited: Dunlap v. State, 303 Ark. 222, 795 S.W.2d 920 (1990).

SUBCHAPTER 4 — ARKANSAS LAW ON OBSCENITY

SECTION.

5-68-401. Title.

5-68-402. Purpose and intent.

5-68-403. Definitions.

5-68-404. Mailable matter subject to provisions of subchapter.

5-68-405. Possession, sale, or distribution.

5-68-406. Action to determine obscenity.

5-68-407. Complaint.

5-68-408. Order to show cause.

5-68-409. Answer — Trial date.

SECTION.

5-68-410. Trial procedure.

5-68-411. Judgment — Enforcement.

5-68-412. Injunctions.

5-68-413. Contempt.

5-68-414. Extradition.

5-68-415. Possession of things enumerated in § 5-68-405 creates a presumption.

5-68-416. Nonresidents subject to jurisdiction.

Publisher's Notes. This subchapter may be partially superseded by §§ 5-68-301 — 5-68-308.

RESEARCH REFERENCES

Ark. L. Rev. Legislation — No. 261 — Obscene Materials — Circulation Enjoined — Possession Penalized, 15 Ark. L. Rev. 438.

The Arkansas Obscenity Doctrine: Its Establishment and Evolution, 47 Ark. L. Rev. 393.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

CASE NOTES

Constitutionality.

The distribution of books and magazines, even though obscene, is protected by the First and Fourteenth Amendments to the Constitution of the United States from governmental suppression, whether criminal or civil, in personam or in rem. *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967).

There is no statutory authority in this subchapter authorizing a prospective injunction against allegedly obscene material not described in the complaint and not being promoted, displayed or possessed by the petitioners when the action is filed. *Brown v. Kimbrough*, 263 Ark. 913, 568 S.W.2d 226 (1978).

5-68-401. Title.

This subchapter shall be known as the "Arkansas Law on Obscenity" and may be referred to by that designation.

History. Acts 1961, No. 261, § 1; A.S.A. 1947, § 41-3562.

5-68-402. Purpose and intent.

(a) The General Assembly determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this state.

(b) The elimination of this evil and the consequent protection of the citizens and residents of this state against those publications are in the best interests of the morals and general welfare of the people.

(c) The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach nonresidents responsible for the composition, publication, and distribution of obscene publications within the state.

History. Acts 1961, No. 261, § 2; A.S.A. 1947, § 41-3563.

5-68-403. Definitions.

As used in this subchapter:

(1) "Mailable matter" means:

(A) Printed or written matter or material having second-class mailing privileges under the laws of the United States; or

(B) Any other printed or written matter or material that has not been determined to be nonmailable under the laws of the United States;

(2) "Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest;

(3) "Person" means any individual, partnership, firm, association, corporation, or other legal entity; and

(4)(A) "Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper, or other printed or written matter.

(B) "Printed or written matter or material" does not include written or printed matter or material used by or in any recognized religious, scientific, or educational institution

History. Acts 1961, No. 261, § 3;
A.S.A. 1947, § 41-3564.

5-68-404. Mailable matter subject to provisions of subchapter.

Any mailable matter that is sent or caused to be sent, brought, or caused to be brought into this state for sale or commercial distribution or that in this state is sold, exhibited or commercially distributed, given away, or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any person with knowledge of the judgment with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of § 5-68-405.

History. Acts 1961, No. 261, § 12;
A.S.A. 1947, § 41-3573.

5-68-405. Possession, sale, or distribution.

(a) Any person that, with knowledge of its contents, sends or causes to be sent or brings or causes to be brought into this state for sale or commercial distribution, or in this state prepares, publishes, sells, exhibits, or commercially distributes, or gives away or offers to give away or has in the person's possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material other than mailable matter, or any mailable matter known by the person to have been judicially found to be obscene under this subchapter, or that knowingly informs another of when, where, how, or from whom or by what means any of these things can be purchased or obtained, is guilty of a Class D felony.

(b) Any person that, with knowledge of its contents, has in the person's possession any obscene printed or written matter or material other than mailable matter, or any mailable matter known by that

person to have been judicially found to be obscene under this subchapter, is guilty of a Class A misdemeanor.

History. Acts 1961, No. 261, § 4; A.S.A. 1947, § 41-3565; Acts 2005, No. 1994, § 430.

Amendments. The 2005 amendment inserted “or her” in (a) and (b); in (a), substituted “Class D felony” for “felony and upon conviction shall be fined not more than two thousand dollars (\$2,000) or be imprisoned for a period not less than

one (1) year nor more than five (5) years, or be both fined and imprisoned”; and, in (b), substituted “Class A misdemeanor” for “misdemeanor and upon conviction shall be fined not more than one thousand dollars (\$1,000) or be imprisoned in the county jail for a period not to exceed one (1) year, or both.”

RESEARCH REFERENCES

ALR. Constitutionality of state statutes banning distribution of sexual devices. 94 ALR 5th 497.

CASE NOTES

Cited: *Brown v. Kimbrough*, 263 Ark. 913, 568 S.W.2d 226 (1978).

5-68-406. Action to determine obscenity.

The prosecuting attorney for the county where obscene mailable matter is sent or caused to be sent, brought, or caused to be brought or where it is prepared, sold, exhibited or commercially distributed, or given away or offered to be given away or possessed shall institute an action in the circuit court for that county for an adjudication of the obscenity of the mailable matter if the prosecuting attorney has reasonable cause to believe that any person with knowledge of its contents is:

(1) Engaged in sending obscene mailable matter, causing it to be sent, bringing or causing it to be brought, into this state for sale or commercial distribution; or

(2) In this state preparing, selling, exhibiting or commercially distributing obscene mailable matter, giving it away, offering to give it away, or has it in the person's possession with intent to sell, commercially distribute, exhibit, give it away, or offer to give it away.

History. Acts 1961, No. 261, § 5; A.S.A. 1947, § 41-3566.

5-68-407. Complaint.

(a) The action authorized in § 5-68-406 is commenced by the filing of a complaint to which is attached as an exhibit a true copy of the allegedly obscene mailable matter.

(b) The complaint shall:

(1) Be directed against the mailable matter by name or description;

(2) Allege the mailable matter's obscene nature;

(3) Designate as respondents and list the names and addresses, if known, of the mailable matter's author, publisher, and any other person sending or causing it to be sent, bringing, or causing it to be brought into this state for sale or commercial distribution and of any person in this state preparing, selling, exhibiting, or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(4) Pray for an adjudication that the mailable matter is obscene;

(5) Pray for a permanent injunction against any person sending or causing the mailable matter to be sent, bringing, or causing it to be brought into this state for sale or commercial distribution, or in this state preparing, selling, exhibiting, or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

(6) Pray for the mailable matter's surrender, seizure, and destruction.

History. Acts 1961, No. 261, § 6;
A.S.A. 1947, § 41-3567.

CASE NOTES

Cited: *Brown v. Kimbrough*, 263 Ark.
913, 568 S.W.2d 226 (1978).

5-68-408. Order to show cause.

(a) Upon the filing of the complaint described in § 5-68-407, the prosecuting attorney shall present the complaint, including the exhibit to the complaint, as soon as practicable to the circuit court for its examination.

(b) If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the circuit court shall dismiss the complaint.

(c) If the circuit court finds probable cause to believe the mailable matter to be obscene, it shall issue an order to show cause why the mailable matter shall not be adjudicated obscene, returnable not less than ten (10) days after the order's service, directed against the mailable matter by name or description and directing the service of a copy of the order, together with a copy of the complaint upon the mailable matter and upon each of the respondents named in the complaint.

(d) Service of the order shall be made upon the mailable matter at its place of publication or its editorial offices as shown in the order.

(e) Service of the order or any copy of the order may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any nonresident respon-

dent, by registered or certified mail directed to theailable matter of the respondent to be served at the address shown in the complaint.

(f) Proof of the mailing is deemed to be prima facie evidence of service of the order or a copy of the order upon theailable matter or any respondent for the purposes of this section.

History. Acts 1961, No. 261, § 7;
A.S.A. 1947, § 41-3568.

5-68-409. Answer — Trial date.

(a) On or before the return date specified in the order to show cause, theailable matter and each respondent may file an answer or other defense.

(b) By order, the circuit court may permit any person to appear and file an answer as amicus curiae.

(c) If no person files an answer or other defense on or before the return date specified in the order to show cause, the circuit court may immediately determine whether theailable matter is obscene and enter an appropriate judgment.

(d) Upon the expiration of the time for filing an answer or other defense by theailable matter and all respondents, and, upon the circuit court's own motion or upon the application of any party, the circuit court may set a date for the trial of the issues joined.

History. Acts 1961, No. 261, § 8;
A.S.A. 1947, § 41-3569.

5-68-410. Trial procedure.

(a) The public interest requires that any action prescribed in this subchapter, other than a criminal action under § 5-68-405, be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press, and freedom of speech.

(b) The rules of civil procedure pertaining to equity cases are applicable to the trial of an action prescribed in this subchapter, other than a criminal action under § 5-68-405.

History. Acts 1961, No. 261, § 9;
A.S.A. 1947, § 41-3570.

5-68-411. Judgment — Enforcement.

If the circuit court finds theailable matter to be obscene, it shall enter judgment to that effect and may, in the judgment or in a subsequent order of enforcement of the judgment:

(1) Enter a permanent injunction against any respondent prohibiting the respondent from doing or continuing to do any act condemned by this subchapter;

(2) Direct any resident respondent to dispose of any obscene mailable matter in the resident respondent's possession or under the resident respondent's control under such conditions and within such time as the circuit court may find to be reasonable; or

(3) If any respondent fails to comply with an order of the circuit court, direct any sheriff in the state to seize and destroy any obscene mailable matter in the possession or under the control of the respondent wherever the obscene mailable matter may be found.

History. Acts 1961, No. 261, § 10;
A.S.A. 1947, § 41-3571.

CASE NOTES

Cited: Brown v. Kimbrough, 263 Ark.
913, 568 S.W.2d 226 (1978).

5-68-412. Injunctions.

(a) Any order granting an injunction shall:

(1) Set forth the reasons for its issuance;

(2) Be specific in terms;

(3) Describe in reasonable detail, and not by reference to the complaint or other document, the act sought to be restrained; and

(4) Be binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation by contract or arrangement with the respondents that receive actual notice of the order by personal service or otherwise.

(b) A copy of any order of the circuit court in finding any matter to be obscene and any order of injunction issued in regard to the matter shall be served upon all persons, and in the same manner, as is provided in § 5-68-408.

History. Acts 1961, No. 261, § 11;
A.S.A. 1947, § 41-3572.

CASE NOTES

Cited: Brown v. Kimbrough, 263 Ark.
913, 568 S.W.2d 226 (1978).

5-68-413. Contempt.

Any respondent or any officer, agent, servant, employee, or attorney of the respondent or any person in active concert or participation by contract or arrangement with the respondent, that receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to § 5-68-412 and that disobeys any provision of the injunction or restraining order is guilty of contempt of court.

History. Acts 1961, No. 261, § 13;
A.S.A. 1947, § 41-3574.

5-68-414. Extradition.

In any case in which a circuit court has entered its judgment, pursuant to § 5-68-411, that the mailable matter in question is obscene, and a charge of continuing violation is brought against a person that, being a respondent to the judgment, cannot be found in this state, the Governor shall demand the person's extradition from the executive authority of the state where the person may be found pursuant to the laws of this state unless the person has appealed from the judgment and the appeal has not been finally determined.

History. Acts 1961, No. 261, § 14;
A.S.A. 1947, § 41-3575.

5-68-415. Possession of things enumerated in § 5-68-405 creates a presumption.

(a)(1) The possession of any three (3) of the things enumerated in § 5-68-405, except the possession of them for the purpose of return to the person from whom received, creates a presumption that the things are intended for sale or commercial distribution, exhibition, or gift.

(2) However, the presumption under subdivision (a)(1) of this section is rebuttable.

(b) The burden of proof that the possession of the things is for the purpose of return to the person from whom received is on the possessor.

History. Acts 1961, No. 261, § 15;
A.S.A. 1947, § 41-3576.

5-68-416. Nonresidents subject to jurisdiction.

In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons that are responsible for the importation of obscene printed or written matter or material into this state and, by that act, submit themselves to the jurisdiction of the courts of this state in any action authorized by § 5-68-406.

History. Acts 1961, No. 261, § 16;
A.S.A. 1947, § 41-3577.

SUBCHAPTER 5 — SELLING OR LOANING PORNOGRAPHY TO MINORS

SECTION.

5-68-501. Definitions.

5-68-502. Unlawful acts.

SECTION.

5-68-503. Penalties.

CASE NOTES

Cited: Fortner v. State, 258 Ark. 591,
528 S.W.2d 378 (1975).

5-68-501. Definitions.

As used in this subchapter:

(1) "CD-ROM" means a compact disk that:

(A) Has the capacity to store graphic, audio, video, and written material; and

(B) May be used by a computer or other device to play or display material harmful to minors;

(2) "Harmful to minors" means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics:

(A) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors;

(B) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(C) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors;

(3) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief that warrants further inspection or inquiry of both:

(A) The character and content of any material described in this section that is reasonably susceptible to examination by the defendant; and

(B)(i) The age of the minor.

(ii) However, an honest mistake constitutes an excuse from liability under this section if the defendant made a reasonable bona fide attempt to ascertain the age of the minor;

(4) "Magnetic disk memory" means a memory system that stores and retrieves binary data on a record-like metal or plastic disk coated with a magnetic material, including, but not limited to, a hard disk drive and a floppy diskette;

(5) "Magnetic tape memory" means a memory system that stores and retrieves binary data on magnetic recording tape;

(6)(A) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture, film,

record, recording tape, CD-ROM disk, magnetic disk memory, magnetic tape memory, video tape, or other media.

(B) However, “material” does not include a matter displayed, transmitted, retrieved, or stored on the Internet or other network for the electronic dissemination of information;

(7) “Minor” means any person under eighteen (18) years of age;

(8) “Nudity” means a:

(A) Showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering;

(B) Showing of the female breast with less than a fully opaque covering of any portion of the female breast below the top of the nipple; or

(C) Depiction of covered male genitals in a discernibly turgid state;

(9)(A) “Performance” means any motion picture, film, video tape, played record, phonograph or tape, preview, trailer, play, show, skit, dance, or other exhibition performed or presented to or before an audience of one (1) or more, with or without consideration.

(B) However, “performance” does not include a matter displayed, transmitted, retrieved, or stored on the Internet or other network for electronic dissemination of information;

(10) “Person” means any individual, partnership, association, corporation, or other legal entity of any kind;

(11) “Reasonable bona fide attempt” means an attempt to ascertain the true age of a minor by requiring production of a driver’s license, marriage license, birth certificate, or other governmental or educational identification card or paper and not relying solely on an oral allegation or apparent age of the minor;

(12) “Sodomasochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask, or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of a person so clothed;

(13) “Sexual conduct” means an act of masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or female breast; and

(14) “Sexual excitement” means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

History. Acts 1969, No. 133, § 1;
A.S.A. 1947, § 41-3581; Acts 1999, No.
1263, § 1.

CASE NOTES

Construction.

In response to certified questions from the federal district court, the State Supreme Court determined that all minors had to be protected from material that was deemed to be harmful to minors; specifically, this material had to be ob-

structed from view and physically segregated for librarians and booksellers to avoid prosecution. *Shipley, Inc. v. Long*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 602 (Oct. 21, 2004).

Cited: *State v. Brown*, 265 Ark. 41, 577 S.W.2d 581 (1979).

5-68-502. Unlawful acts.

It is be unlawful for any person, including, but not limited to, any person having custody, control, or supervision of any commercial establishment, to knowingly:

(1)(A) Display material that is harmful to minors in such a way that a minor, as a part of the invited general public, is exposed to view the material.

(B) However, a person is deemed not to have displayed material harmful to minors if:

(i) The lower two-thirds ($\frac{2}{3}$) of the material is not exposed to view; and

(ii) The material is segregated in a manner that physically prohibits access to the material by a minor;

(2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor with or without consideration any material that is harmful to minors.

(B) However, the prohibition under subdivision (2)(A) of this section does not apply to any dissemination:

(i) By a parent, guardian, or relative within the third degree or consanguinity of the minor; or

(ii) With the consent of a parent or guardian of the minor;

(3)(A) Present to a minor or participate in presenting to a minor with or without consideration any performance that is harmful to minors.

(B) However, the prohibition under subdivision (3)(A) of this section does not apply to any dissemination:

(i) By a parent, guardian, or relative within the third degree of consanguinity to the minor; or

(ii) With the consent of a parent or guardian of the minor.

History. Acts 1969, No. 133, § 2; A.S.A. 1947, § 41-3582; Acts 1999, No. 1263, § 2; 2003, No. 858, § 1.

Amendments. The 2003 amendment, in (1)(B), deleted “material is kept behind

devices commonly known as ‘blinder racks’ so that the” preceding “lower” and added “and segregated in a manner that physically prohibits access to the materials by minors.”

CASE NOTES**Construction.**

In response to certified questions from the federal district court, the State Supreme Court determined that all minors had to be protected from material that was deemed to be harmful to minors; specifically, this material had to be obstructed from view and physically segregated for librarians and booksellers to avoid prosecution. *Shipley, Inc. v. Long*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 602 (Oct. 21, 2004).

The “safe harbor” provision of this section requires only that some physical ob-

stacle stand between minors and the area where prohibited material is displayed so that minors have no access to such material; although booksellers may choose the method best suited to their individual establishments, it remains for the federal court to ultimately determine whether such a requirement violates the First Amendment rights of booksellers, librarians, and their adult customers. *Shipley, Inc. v. Long*, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 602 (Oct. 21, 2004).

5-68-503. Penalties.

Any person violating any provision of this subchapter is guilty of a Class B misdemeanor.

History. Acts 1969, No. 133, § 3; A.S.A. 1947, § 41-3583; Acts 2005, No. 1994, § 382.

Amendments. The 2005 amendment substituted “Class B misdemeanor” for “misdemeanor and, upon conviction, shall

be subject to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or imprisonment of not less than three (3) months nor more than six (6) months, or both fine and imprisonment.”

CHAPTER 69
OIL AND GAS

SECTION.

5-69-101. Extension of gas pipe without permission.

SECTION.

5-69-102. Carbon black.

Effective Dates. Acts 1905, No. 242, § 6: effective on passage.

5-69-101. Extension of gas pipe without permission.

(a) It is declared to be unlawful for any person in any manner to change, extend, or alter, or to cause to be changed, extended, or altered, any service or other pipe or attachment of any kind, by or through which natural or artificial gas is furnished from the gas mains or pipes of any person, company, or corporation without first securing from that person, company, or corporation written permission to make the change, extension, or alteration.

(b) Any person violating any provision of subsection (a) of this section upon conviction is guilty of a Class A misdemeanor.

History. Acts 1905, No. 242, §§ 4, 5, p. 635; C. & M. Dig., §§ 2481, 2482; Pope’s Dig., §§ 3120, 3121; A.S.A. 1947, §§ 41-3651, 41-3652; Acts 2005, No. 1994, § 467.

Amendments. The 2005 amendment,

in (b), substituted “guilty of a Class A misdemeanor” for “fined in any sum not less than five dollars (\$5.00) nor more than one hundred dollars (\$100) for such offense.”

5-69-102. Carbon black.

(a) The use of natural gas within the State of Arkansas for the purpose of obtaining the carbon black content by the process of burning is prohibited.

(b) The erection, enlargement, maintenance, and operation of any plant in the State of Arkansas for the purpose of burning natural gas to obtain from the natural gas the carbon black content is prohibited within this state.

(c) No person, firm, or corporation owning or operating any gas well within this state shall:

(1) Use any part of the gas produced from the gas well for the purpose of obtaining the carbon black content of the gas by the process of burning; or

(2) Sell or deliver any part of the gas produced from the gas well to any other person, firm, or corporation for use by that person, firm, or corporation in obtaining the carbon black content of the gas by the process of burning the gas.

(d)(1) The erection, maintenance, or operation of any carbon black plant in violation of this section or the use, sale, or delivery of any natural gas from any gas well in this state in violation a provision of this section is declared a public nuisance.

(2) The Attorney General and the several prosecuting attorneys of this state are authorized and directed to proceed in the name of the State of Arkansas in any court of competent jurisdiction by injunction, mandamus, or other appropriate remedy for the abatement of a public nuisance under subdivision (d)(1) of this section.

(e)(1) Any person, firm, or corporation violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000).

(2) Each day that any plant is operated for the purpose of manufacturing carbon black or each day that any gas is used, sold, or delivered from any gas well in violation of a provision of this section is deemed a separate offense.

(f) Nothing in this section shall be construed as prohibiting the use of casing-head gas, produced from any oil well, in the manufacture of carbon black.

History. Acts 1925, No. 350, §§ 1-6; Pope's Dig., §§ 3122-3127; A.S.A. 1947, §§ 41-3653 — 41-3658; Acts 2005, No. 1994, § 56.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor" in present (e)(1).

CHAPTER 70

PROSTITUTION

SECTION.

5-70-101. Definitions.

5-70-102. Prostitution.

5-70-103. Patronizing a prostitute.

5-70-104. Promoting prostitution in the first degree.

SECTION.

5-70-105. Promoting prostitution in the second degree.

5-70-106. Promoting prostitution in the third degree.

Cross References. Fines, § 5-4-201.
House of ill fame, abatement as nuisance, § 20-27-401.

Municipalities may regulate or suppress houses of ill fame, § 14-54-103.
Sexual offenses, § 5-14-101 et seq.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1981, No. 816, § 3: Mar. 28, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the existing penalties for persons engaged in acts of prostitution do not constitute a sufficient deterrent to further violation of the stat-

utes and that increased penalties for such acts can provide such a deterrent. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Entrapment defense in sex offense prosecutions. 12 ALR 4th 413.

Am. Jur. 63C Am. Jur. 2d, Prostitution, § 1 et seq.

C.J.S. 73 C.J.S., Prostitution, § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

5-70-101. Definitions.

As used in this chapter:

(1) "Advances prostitution" means a person if, acting other than as a prostitute or a patron of a prostitute, that person knowingly:

(A) Causes or aids a person to commit or engage in prostitution;

(B) Procures or solicits a patron for prostitution;

(C) Provides a person or premises for prostitution purposes;

(D) Operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(E) Engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution;

(2) "Physical force" means any bodily impact, restraint, or confinement or the threat of bodily impact, restraint, or confinement;

(3) "Profits from prostitution" means a person if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, the person accepts or receives money or other property pursuant to an agreement or understanding with any person in which the person participates or is to participate in the proceeds of prostitution; and

(4) "Sexual activity" means sexual intercourse, deviate sexual activity, or sexual contact as defined in § 5-14-101.

History. Acts 1975, No. 280, § 3001; A.S.A. 1947, § 41-3001.

5-70-102. Prostitution.

(a) A person commits prostitution if in return for or in expectation of a fee he or she engages in or agrees or offers to engage in sexual activity with any other person.

(b) Prostitution is a:

(1) Class B misdemeanor for the first offense; and

(2) Class A misdemeanor for second and subsequent offenses.

History. Acts 1975, No. 280, § 3002; 1981, No. 816, § 1; 1983, No. 414, § 1; A.S.A. 1947, § 41-3002.

Cross References. Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies, § 5-74-109.

Municipal corporations' powers and restrictions, § 14-54-102.

Criminal nuisance abatement boards, § 14-54-1701 et seq.

Common nuisance declared, § 16-105-402.

RESEARCH REFERENCES

UALR L.J. Notes, Wrongful Discharge — Sexual Harassment Equated With Prostitution to Find Public Policy Exception, 8 UALR L.J. 49.

Note, Labor — Employment at Will — Public Policy Exception Recognized, *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), 11 UALR L.J. 617.

CASE NOTES

Cited: *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984).

5-70-103. Patronizing a prostitute.

(a) A person commits the offense of patronizing a prostitute if he or she:

(1) Pays or agrees to pay a fee to another person on an understanding that in return that person or a third person will engage in sexual activity with him or her; or

(2) Solicits or requests another person to engage in sexual activity with him or her in return for a fee.

(b) Patronizing a prostitute is a:

(1) Class B misdemeanor for the first offense; and

(2) Class A misdemeanor for second and subsequent offenses.

History. Acts 1975, No. 280, § 3003; A.S.A. 1947, § 41-3003; Acts 1999, No. 591, § 1.

RESEARCH REFERENCES

Ark. L. Rev. The Impact of the 1976 Criminal Code on the Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100.

5-70-104. Promoting prostitution in the first degree.

(a) A person commits the offense of promoting prostitution in the first degree if he or she knowingly:

(1) Advances prostitution by compelling a person by physical force or intimidation to engage in prostitution or profits from such coercive conduct by another; or

(2) Advances prostitution or profits from prostitution of a person less than eighteen (18) years of age.

(b) Promoting prostitution in the first degree is a Class D felony.

History. Acts 1975, No. 280, § 3004;
A.S.A. 1947, § 41-3004.

CASE NOTES

ANALYSIS

Evidence.
Force or intimidation.
Instructions.
Prior conduct as prostitute.

Evidence.

Evidence held sufficient to support convictions. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

Force or Intimidation.

In prosecution against two defendants for promoting prostitution, it was not necessary that both defendants used physical force or intimidation in order to be guilty of the charge; if either of the defendants used force or intimidation and both profited from such conduct, then both were guilty of the offense charged. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

Instructions.

In a prosecution for pandering it was

held proper for the court to read former section which defined "pandering" to the jury. *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941) (decision under prior law).

Prior Conduct as Prostitute.

Questions relating to defendant's prior conduct as a prostitute were properly allowed on the theory that the questions and answers went to the proposition of defendant's present income; in such case the probative value did outweigh the prejudicial effect upon the witness's testimony and the fact that defendant may have been engaged in prostitution herself had probative value on the question of guilt or innocence of the charge of promoting prostitution. *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980).

Cited: *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

5-70-105. Promoting prostitution in the second degree.

(a) A person commits the offense of promoting prostitution in the second degree if he or she knowingly advances prostitution or profits from prostitution by managing, supervising, controlling, or owning, either alone or in association with another, a house of prostitution or a prostitution enterprise involving two (2) or more prostitutes.

(b) Promoting prostitution in the second degree is a Class A misdemeanor.

History. Acts 1975, No. 280, § 3005;
A.S.A. 1947, § 41-3005.

CASE NOTES

ANALYSIS

Consent.
Evidence.
Indictment.
Instructions.
Place of prostitution.

Consent.

It was immaterial to a charge of pandering whether the female was virtuous or not, or whether she went of her own free will or not. *Boyle v. State*, 110 Ark. 318,

161 S.W. 1049 (1913) (decision under prior law).

Conviction for pandering was upheld where defendant induced another woman to resume prostitution and it was immaterial whether woman was virtuous or whether she consented to become or remain a prostitute. *Inman v. State*, 255 Ark. 197, 500 S.W.2d 82 (1973) (decision under prior law).

Evidence.

Where the defendant was charged with

the unlawful and felonious taking of money, evidence that he received things other than money was admissible to show that the defendant was engaged in the business of receiving money and profit out of the prostitution of his wife. *Sweat v. State*, 126 Ark. 213, 190 S.W. 433 (1916) (decision under prior law).

The evidence held sufficient to sustain a conviction on charge of operating a house of prostitution. *Hicks v. State*, 213 Ark. 108, 209 S.W.2d 451 (1948) (decision under prior law).

Indictment.

An indictment which failed to allege that the defendant received or appropriated money without consideration from the earnings of a prostitute was defective. *Thomas v. State*, 181 Ark. 316, 25 S.W.2d 424 (1930) (decision under prior law).

Instructions.

In a prosecution for pandering it was held proper for the court to read former section which defined "pandering" to the jury. *Malone v. State*, 202 Ark. 796, 152

S.W.2d 1019 (1941) (decision under prior law).

Instruction which did not tell jury that defendant could be convicted only for receiving of or from a woman's prostitution, and not for her earnings, if any, from legitimate sources, was not erroneous, especially when no specific objection was made. *Melton v. State*, 212 Ark. 968, 209 S.W.2d 99 (1948) (decision under prior law).

Place of Prostitution.

The defense could show that the house where the female was taken was not a place of prostitution, nor a place where it was encouraged or allowed. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

The former section defining "pandering" was not violated by taking a woman to a thicket, unless prostitution was there practiced, encouraged or allowed, or unless men and women resorted there for illicit intercourse. *State v. Wilson*, 118 Ark. 360, 176 S.W. 311 (1915) (decision under prior law).

5-70-106. Promoting prostitution in the third degree.

(a) A person commits the offense of promoting prostitution in the third degree if:

(1) Having a possessory or proprietary interest in premises that he or she knows is being used for prostitution, the person fails to make reasonable effort to halt or abate the use for prostitution; or

(2) He or she knowingly advances prostitution or profits from prostitution.

(b) Promoting prostitution in the third degree is a Class B misdemeanor.

History. Acts 1975, No. 280, § 3006; A.S.A. 1947, § 41-3006.

CASE NOTES

ANALYSIS

Consent.

Evidence.

Indictment.

Instructions.

Place of prostitution.

Consent.

It was immaterial to a charge of pandering whether the female was virtuous or not, or whether she went of her own free

will or not. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

Conviction for pandering was upheld where defendant induced another woman to resume prostitution and it was immaterial whether woman was virtuous or whether she consented to become or remain a prostitute. *Inman v. State*, 255 Ark. 197, 500 S.W.2d 82 (1973) (decision under prior law).

Evidence.

Where the defendant was charged with the unlawful and felonious taking of money, evidence that he received things other than money was admissible to show that the defendant was engaged in the business of receiving money and profit out of the prostitution of his wife. *Sweat v. State*, 126 Ark. 213, 190 S.W. 433 (1916) (decision under prior law).

Indictment.

An indictment which failed to allege that the defendant received or appropriated money without consideration from the earnings of a prostitute was defective. *Thomas v. State*, 181 Ark. 316, 25 S.W.2d 424 (1930) (decision under prior law).

Instructions.

In a prosecution for pandering it was held proper for the court to read former section which defined “pandering” to the jury. *Malone v. State*, 202 Ark. 796, 152 S.W.2d 1019 (1941) (decision under prior law).

Instruction which did not tell jury that

appellant could be convicted only for receiving of or from a woman’s prostitution, and not for her earnings, if any, from legitimate sources, was not erroneous, especially when no specific objection was made. *Melton v. State*, 212 Ark. 968, 209 S.W.2d 99 (1948) (decision under prior law).

Place of Prostitution.

The defense could show that the house where the female was taken was not a place of prostitution, nor a place where it was encouraged or allowed. *Boyle v. State*, 110 Ark. 318, 161 S.W. 1049 (1913) (decision under prior law).

The former section defining “pandering” was not violated by taking a woman to a thicket, unless prostitution was there practiced, encouraged or allowed, or unless men and women resorted there for illicit intercourse. *State v. Wilson*, 118 Ark. 360, 176 S.W. 311 (1915) (decision under prior law).

Cited: *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

CHAPTER 71

RIOTS, DISORDERLY CONDUCT, ETC.

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. OFFENSES GENERALLY.
- 3. PROMOTING CIVIL DISORDER.

A.C.R.C. Notes. References to “this chapter” in subchapters 1 and 2 may not

apply to §§ 5-71-228 and 5-71-229 which were enacted subsequently.

RESEARCH REFERENCES

ALR. Conduct sufficiently violent, tumultuous, forceful, aggressive, or terrorizing to establish crime of riot. 38 ALR 4th 648.

Prosecutions of inmates of state or local penal institutions for crime of riot. 39 ALR 4th 1170.

Am. Jur. 53A Am. Jur. 2d, Mobs, § 1 et seq.

Ark. L. Rev. 1976 Criminal Code-General Principles, 30 Ark. L. Rev. 111.

Disorderly Conduct and Loitering — A Modern Approach to Traditional Legislation, 30 Ark. L. Rev. 186.

C.J.S. 27 C.J.S., Disord. Cond., § 1 et seq.

77 C.J.S., Riot, § 1 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

5-71-101. Definitions.

5-71-101. Definitions.

As used in this chapter:

(1) "Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of one (1) person by the penis of another person; or

(B) The penetration, however slight, of the vagina or anus of one (1) person by any body member or foreign instrument manipulated by another person;

(2) "Governmental function" means any activity that a public servant is legally authorized to undertake on behalf of any governmental unit he or she serves;

(3) "Occupiable structure" means a vehicle, building, or other structure:

(A) Where any person lives or carries on a business or other calling;

(B) Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or

(C)(i) That is customarily used for overnight accommodation of persons, whether or not a person is actually present.

(ii) Each unit of an occupiable structure divided into separately occupied units is itself an occupiable structure;

(4) "Property" means real property or tangible or intangible personal property, including money or any paper or document that represents or embodies anything of value;

(5) "Prostitution" has the meaning specified in § 5-70-102;

(6) "Public building" means a structure owned, operated, or occupied by any agency of the State of Arkansas or its political subdivisions or by any agency of the United States Government;

(7) "Public place" means a publicly or privately owned place to which the public or a substantial number of people have access;

(8) "Vehicle" means any craft or device designed for the transportation of people or property across land or water or through the air; and

(9) "Vital public facility" means a facility maintained for use for:

(A) Public communications;

(B) Transportation;

(C) Supply of water, gas, or power;

(D) Law enforcement;

(E) Fire protection;

(F) Civil or national defense; or

(G) Other public service.

History. Acts 1975, No. 280, § 2901; A.S.A. 1947, § 41-2901.

CASE NOTES

Public Place.

The definition of “public place” speaks only to accessibility, not visibility. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

Where defendant was attending a private party and was drinking on the tail-

gate of a pickup parked in the side yard of the residence, defendant was not drinking in a “public place” as that term is used in subdivision (6) of this section. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

SUBCHAPTER 2 — OFFENSES GENERALLY

SECTION.

- 5-71-201. Riot.
- 5-71-202. Aggravated riot.
- 5-71-203. Inciting riot.
- 5-71-204. Arming rioters.
- 5-71-205. Unlawful assembly.
- 5-71-206. Failure to disperse.
- 5-71-207. Disorderly conduct.
- 5-71-208. Harassment.
- 5-71-209. Harassing communications.
- 5-71-210. Communicating a false alarm.
- 5-71-211. Threatening a fire or bombing.
- 5-71-212. Public intoxication — Drinking in public.
- 5-71-213. Loitering.

SECTION.

- 5-71-214. Obstructing a highway or other public passage.
- 5-71-215. Defacing objects of public respect.
- 5-71-216. Defacing public buildings.
- 5-71-217 — 5-71-224. [Reserved.]
- 5-71-225. [Repealed.]
- 5-71-226. Disruption of campus activities.
- 5-71-227. [Repealed.]
- 5-71-228. Obstruction of shooting, hunting, fishing, or trapping activities.
- 5-71-229. Stalking.

Cross References. Fines, § 5-4-201. Riotous and unlawful assemblies, dispersal, § 12-11-103.

Term of imprisonment, § 5-4-401.

Effective Dates. Acts 1975 (Extended Sess., 1976), No. 1155, § 4: Feb. 11, 1976. Emergency clause provided: “It is hereby found and determined by the General Assembly that a question has arisen as to whether Section 2913 of 280 of 1975, defining the offense of Public Intoxication, repealed by implication that portion of Ark. Stat. Ann. Section 48-943 (Repl. 1964) prohibiting the drinking of intoxicating beverages in public places; that the General Assembly did not intend to repeal by implication such portion of Section 48-943; that conflicting interpretations of the repealed effect of Section 2913 of Act 280 of 1975 will result in inequitable enforcement of the present statutory prohibition against public drinking; and that the immediate passage of this Act is necessary to clarify the state of the law as to the legality of drinking intoxicating beverages

in public places. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1987, No. 877, § 4: Apr. 13, 1987. Emergency clause provided: “It is hereby found and determined by the General Assembly that a question has arisen over the validity of Act 1155 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law as to the legality of drinking intoxicating beverages in public places. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1989, No. 146, § 4: Feb. 21, 1989. Emergency clause provided: “It is hereby found and determined by the General As-

sembly that the use of electronic communication devices can be used to facilitate drug trafficking in the schools and that the use of such devices should be eliminated unless a legitimate purpose is found to exist for the possession of such devices upon the school campuses. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, Nos. 379 and 388, § 10: Mar. 8, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate stalking and that immediate passage of this act is necessary to protect the public peace, health and safety of the State of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 1302, § 8: Apr. 14, 1995. Emergency clause provided: "It is hereby found and determined by the General As-

sembly of the State of Arkansas that the Attorney General and the Prosecuting Attorneys are in need of specific legislation by which to eliminate stalking and that immediate passage of this act is necessary to protect the public peace, health and safety of the State of Arkansas. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 2003, No. 1342, § 6: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the State of Arkansas' criminal statutes do not adequately address terrorism, as terrorism is known since September 11, 2001. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; or (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Insulting words addressed directly to police officer as disorderly conduct or breach of peace. 14 ALR 4th 1252.

5-71-201. Riot.

(a) A person commits the offense of riot if, with two (2) or more other persons, he or she knowingly engages in tumultuous or violent conduct that creates a substantial risk of:

- (1) Causing public alarm;
 - (2) Disrupting the performance of a governmental function; or
 - (3) Damaging or injuring property or a person.
- (b) Riot is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2902; A.S.A. 1947, § 41-2902.

5-71-202. Aggravated riot.

(a) A person commits the offense of aggravated riot if he or she commits the offense of riot when:

- (1) The person knowingly possesses a deadly weapon;
 - (2) The person knows that another person with whom he or she is acting possesses a deadly weapon.
- (b) Aggravated riot is a Class D felony.

History. Acts 1975, No. 280, § 2903;
A.S.A. 1947, § 41-2903.

5-71-203. Inciting riot.

(a) A person commits the offense of inciting riot if he or she knowingly:

- (1) By speech or conduct urges others to participate in a riot under circumstances that produce a clear and present danger that they will participate in a riot; or
- (2) Gives commands, instructions, or signals to others in furtherance of a riot.

(b)(1) Inciting riot is a Class D felony if injury to a person or damage to property results from the offense.

(2) Otherwise, inciting riot is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2904;
A.S.A. 1947, § 41-2904.

CASE NOTES**Equal Protection.**

Former section, which excluded lawful labor union activities from the prohibition on inciting to riot, did not deny equal

protection of the laws. *Chapman v. State*, 257 Ark. 415, 516 S.W.2d 598 (1974) (decision under prior law).

5-71-204. Arming rioters.

(a) A person commits the offense of arming rioters if he or she:

- (1) Furnishes a deadly weapon or explosive device to another person knowing the deadly weapon or explosive device is to be used in a riot; or
- (2) Instructs another person in the preparation or use of a deadly weapon or explosive device knowing that the deadly weapon or explosive device is to be used in a riot.

(b) Arming rioters is a Class B felony.

History. Acts 1975, No. 280, § 2905;
A.S.A. 1947, § 41-2905.

5-71-205. Unlawful assembly.

(a) A person commits the offense of unlawful assembly if he or she:

- (1) Assembles with two (2) or more other persons; and
- (2) Has the purpose of engaging in conduct constituting a riot.

(b) Unlawful assembly is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2906;
A.S.A. 1947, § 41-2906.

CASE NOTES

ANALYSIS

Indictment or information.
Participation by others required.

Indictment or Information.

An indictment for rioting which would be good at common law was also good under former section prohibiting unlawful assembly. *Roberts v. State*, 21 Ark. 183 (1860) (decision under prior law).

Though good pleading required that names of other rioters be alleged, or allegation that their names were unknown,

information charging only one person was sufficient to sustain conviction where participation of at least two other persons was shown by the evidence. *Craig v. State*, 195 Ark. 925, 114 S.W.2d 1073 (1938) (decision under prior law).

Participation by Others Required.

To sustain a conviction, the participation of at least two other persons in a common unlawful purpose had to be shown. *Craig v. State*, 195 Ark. 925, 114 S.W.2d 1073 (1938) (decision under prior law).

5-71-206. Failure to disperse.

(a) A person commits the offense of failure to disperse if, during a riot or an unlawful assembly, he or she refuses or knowingly fails to disperse when ordered to disperse by a law enforcement officer or other person engaged in enforcing or executing the law.

(b) It is a defense to a prosecution under this section that the actor was a news reporter or other person observing or recording the events on behalf of the news media not knowingly obstructing efforts by a law enforcement officer or other person engaged in enforcing or executing the law to control or abate the riot or unlawful assembly.

(c) Failure to disperse is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2907;
A.S.A. 1947, § 41-2907.

CASE NOTES

ANALYSIS

Law enforcement officer, etc.
Unlawful assembly.

Law Enforcement Officer, Etc.

Words "other public officers" as used in former section providing penalty for failing to disperse meant other officers of the state or political subdivision thereof, such as city police, state police or deputy sheriffs. *Duncan v. Kirby*, 228 Ark. 917, 311

S.W.2d 157 (1958) (decision under prior law).

Unlawful Assembly.

Before an accused could be guilty of failing to disperse he had to assemble with another or others for the purpose of disturbing the peace or committing some unlawful act. *Duncan v. Kirby*, 228 Ark. 917, 311 S.W.2d 157 (1958) (decision under prior law).

5-71-207. Disorderly conduct.

(a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she:

- (1) Engages in fighting or in violent, threatening, or tumultuous behavior;
 - (2) Makes unreasonable or excessive noise;
 - (3) In a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response;
 - (4) Disrupts or disturbs any lawful assembly or meeting of persons;
 - (5) Obstructs vehicular or pedestrian traffic;
 - (6) Congregates with two (2) other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law;
 - (7) Creates a hazardous or physically offensive condition;
 - (8) In a public place, mars, defiles, desecrates, or otherwise damages a patriotic or religious symbol that is an object of respect by the public or a substantial segment of the public; or
 - (9) In a public place, exposes his or her private parts.
- (b) Disorderly conduct is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2908; A.S.A. 1947, § 41-2908.

Cross References. Desecration of the flag, § 5-51-207.

Dueling, Ark. Const., Art. 19, § 2.

RESEARCH REFERENCES

Ark. L. Rev. Egan, "Fighting Words" Doctrine: Are Police Officers Held to a Higher Standard, or per *Bailey v. State*, Do We Expect No More from our Law

Enforcement Officers than We Do from the Average Arkansan, 52 *Ark. L. Rev.* 591.

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 *UALR L.J.* 153.

CASE NOTES

ANALYSIS	
Constitutionality.	sive language as breach of the peace was narrowed to "fighting words" addressed to or about a person in his presence which were calculated to arouse anger in such person, and such words were not protected by the constitutional guarantee of free speech. <i>Hammond v. State</i> , 255 Ark. 56, 498 S.W.2d 652 (1973) (decision under prior law).
Abusive or obscene language.	This section is not unconstitutionally overbroad. <i>Bailey v. State</i> , 334 Ark. 43, 972 S.W.2d 239 (1998).
Arrest.	
Disruption or disturbance of assembly.	
Evidence.	
Indictment.	
Intent.	
Place of offense.	
Search.	
Separate offenses.	
Unreasonable or excessive noise.	
Constitutionality.	Abusive or Obscene Language. Whether profane language was calculated to arouse to anger or produce a
Former section concerning use of abu-	

breach of the peace was a question left to the jury. *State v. Moser*, 33 Ark. 140 (1878); *Ruffin v. State*, 207 Ark. 672, 182 S.W.2d 673 (1944) (preceding decisions under prior law).

It was not necessary for conviction for use of profanity that the profane language be used publicly. *Bodenhamer v. State*, 60 Ark. 10, 28 S.W. 507 (1894) (decision under prior law).

Indictment charging that defendant "did profanely swear and curse" was sufficient without setting out the profane words. *Bodenhamer v. State*, 60 Ark. 10, 28 S.W. 507 (1894) (decision under prior law).

Words used by defendant held insufficient to support conviction. *Holmes v. State*, 135 Ark. 187, 204 S.W. 846 (1918) (decision under prior law).

An indictment which followed the language of the former section concerning use of abusive language as a breach of peace was sufficient. *Schaal v. State*, 150 Ark. 631, 235 S.W. 38 (1921) (decision under prior law).

The fact that abusive language addressed to the arresting officer did not make the officer angry did not prevent it from constituting a violation. *Meyers v. State*, 253 Ark. 38, 484 S.W.2d 334 (1972) (decision under prior law).

Use of certain words was considered the use of "fighting words" under the circumstances, and thus fell within the constitutional reading of former section concerning use of abusive language as a breach of the peace. *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973) (decision under prior law).

Conviction for use of profane, violent or abusive language was improper where there was no determination by the trier of fact that the words spoken by defendant were likely to arouse to immediate and violent anger the person to whom the words were addressed. *Hammond v. Adkisson*, 536 F.2d 237 (8th Cir. 1976) (decision under prior law).

Curses and epithets addressed to a police officer in a department store were "fighting words" within subdivision (a)(3) even though the person addressed was a police officer who was not aroused to violent anger. *Bousquet v. State*, 261 Ark. 263, 548 S.W.2d 125 (1977).

Arrest.

Where the conduct of the defendant

gave reasonable cause to believe that he was in violation of this section, his subsequent warrantless arrest was legal under ARCrP 4.1(c)(iii). *Williams v. State*, 47 Ark. App. 143, 887 S.W.2d 312 (1994).

Disruption or Disturbance of Assembly.

It was not necessary to charge the manner of disturbance in any language more explicit than that used in the former section providing penalty for disturbing an assemblage. *State v. Minyard*, 12 Ark. (7 English) 156 (1851) (decision under prior law).

Indictment for disturbing a religious congregation which did not allege the manner of disturbance was bad in substance and did not support a judgment on a plea of guilty. *Fletcher v. State*, 12 Ark. (7 English) 169 (1851) (decision under prior law).

An indictment for disturbing a congregation assembled for religious worship by "profanely swearing" and by "talking and laughing aloud" was not bad for duplicity, the latter words being merely surplusage. *State v. Horn*, 19 Ark. (6 Barber) 578 (1858) (decision under prior law).

The disturbance of any member of a congregation assembled for religious worship was, in law, a disturbance of the congregation. *State v. Wright*, 41 Ark. 410 (1883); *Walker v. State*, 103 Ark. 336, 146 S.W. 862 (1912) (preceding decisions under prior law).

Membership in a church or organization is not necessarily the controlling factor as to whether a person has committed a crime at a meeting; thus, either a member or a stranger can be guilty of unlawfully disrupting a lawful assembly. *State v. Kimbrough*, 265 Ark. 289, 578 S.W.2d 26 (1979).

Evidence.

Evidence was sufficient to support a conviction for disorderly conduct for cursing police officers in a public place, where defendant was standing in the street shouting, flailing his arms around, cursing, and yelling, and stripping off his shirt and making a fist while taking an aggressive stance against one officer. *Johnson v. State*, 70 Ark. App. 343, 19 S.W.3d 66 (2000).

Evidence was sufficient to support a conviction for disorderly conduct where (1)

the defendant cursed a police officer after being asked his name, (2) the defendant then alternated between states of calm and irrationality and, during those periods of irrationality, he flailed his arms about, cursed loudly, and eventually demonstrated a violent demeanor towards an officer, and (3) another officer on the scene knew the defendant and was aware of his past charge of assaulting a police officer. *Johnson v. State*, 343 Ark. 343, 37 S.W.3d 191 (2001).

Indictment.

In an indictment for disturbing a religious congregation by profanely swearing, it was not necessary to charge the particular language used by the defendant. *State v. Ratliff*, 10 Ark. (5 English) 530 (1850) (decision under prior law).

An indictment for disturbing religious worship "by talking and laughing" and by indecent gestures was not bad for duplicity. It charged but one offense; the words "by talking and laughing" were merely surplusage. *State v. Bledsoe*, 47 Ark. 233, 1 S.W. 149 (1886) (decision under prior law).

An indictment for disturbing a religious congregation was insufficient if it failed to allege that the language or conduct charged as a disturbance was calculated to disquiet, insult, or interrupt the congregation. *State v. Booe*, 62 Ark. 512, 37 S.W. 47 (1896) (decision under prior law).

Intent.

An intent to disturb was not necessary. *Walker v. State*, 103 Ark. 336, 146 S.W. 862 (1912) (decision under prior law).

Place of Offense.

There is no requirement in this section that the disorderly conduct must take place on public property since, unquestionably, public inconvenience, annoyance or alarm within the meaning of this section can occur due to an individual's conduct whether such conduct takes place on private or public property. *Farr v. State*, 6 Ark. App. 14, 636 S.W.2d 884 (1982).

Search.

Since the crime addressed by this section is a minor offense, no exigent circum-

stances were present that would have allowed police officer's warrantless entry into the defendant's home under the "hot pursuit" exception to the warrant requirement, for what was a petty disturbance. *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412, cert. denied, 506 U.S. 998, 113 S. Ct. 597, 121 L. Ed. 2d 534 (1992).

Separate Offenses.

The offense of a breach of the peace by using abusive language was not embraced in the act of assault and battery; they were not of the same generic class and one could not be included in the other, although they arose out of the same occurrence or transaction. *Moreland v. State*, 125 Ark. 24, 188 S.W. 1 (1916) (decision under prior law).

Prosecution in the justice of the peace court for assault and disturbing the public peace did not constitute former jeopardy in prosecution for sodomy, as there was no relation between the misdemeanors of assault and disturbing the peace and the felony of sodomy. *Verser v. State*, 256 Ark. 609, 509 S.W.2d 299 (1974) (decision under prior law).

Disorderly conduct, assault, and battery are not lesser included offenses of robbery but are simply offenses of a different class. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984).

Unreasonable or Excessive Noise.

Where the information charged defendant with disturbing the peace by operating a go-kart race track and juke box in a loud and unusually noisy manner, it sufficiently charged the crime of disturbing the peace, although it also stated that defendant thereby disturbed the peace of a named individual. *England v. State*, 234 Ark. 421, 352 S.W.2d 582 (1962) (decision under prior law).

Cited: *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982); *Perkins v. Cross*, 562 F. Supp. 85 (E.D. Ark. 1983); *McIntosh v. White*, 582 F. Supp. 1244 (E.D. Ark. 1984); *McIntosh v. White*, 676 F. Supp. 912 (E.D. Ark. 1987); *Williams v. State*, 327 Ark. 97, 938 S.W.2d 547 (1997).

5-71-208. Harassment.

(a) A person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he or she:

(1) Strikes, shoves, kicks, or otherwise touches a person, subjects that person to offensive physical contact or attempts or threatens to do so;

(2) In a public place, directs obscene language or makes an obscene gesture to or at another person in a manner likely to provoke a violent or disorderly response;

(3) Follows a person in or about a public place;

(4) In a public place repeatedly insults, taunts, or challenges another person in a manner likely to provoke a violent or disorderly response;

(5) Engages in conduct or repeatedly commits an act that alarms or seriously annoys another person and that serves no legitimate purpose; or

(6) Places a person under surveillance by remaining present outside that person's school, place of employment, vehicle, other place occupied by that person, or residence, other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy.

(b) Harassment is a Class A misdemeanor.

(c) It is an affirmative defense to prosecution under this section if the actor is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his or her duty while conducting surveillance on an official work assignment.

(d)(1) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) This no contact order remains in effect during the pendency of any appeal of a conviction under this section.

(3) The judicial officer or prosecuting attorney shall provide a copy of this no contact order to the victim and arresting agency without unnecessary delay.

(e) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

History. Acts 1975, No. 280, § 2909; 388, § 5; 1995, No. 1302, § 3.

1985, No. 711, § 1; A.S.A. 1947, § 41-2909; Acts 1993, No. 379, § 5; 1993, No.

Cross References. Terroristic threatening, § 5-13-301.

RESEARCH REFERENCES

UALR L.J. Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery Ju-

risdiction. *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 UALR L.J. 537.

CASE NOTES

ANALYSIS

Civil remedies.
Evidence.
Obscene language.
Separate offenses.

Civil Remedies.

A plaintiff who alleged that her neighbors harassed her had a criminal remedy under this section and thus was not entitled to injunctive relief against her neighbors. *Maxwell v. Sutton*, 2 Ark. App. 359, 621 S.W.2d 239 (1981).

Evidence.

Where a juvenile directed comments at another student on the school bus without making any gestures, the evidence did not support his delinquency adjudication for harassment as the comment was not made in a manner likely to provoke a violent or disorderly response. *Hunt v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 611 (Sept. 21, 2005).

Obscene Language.

Conviction for use of profane, violent or abusive language was improper where there was no determination by the trier of fact that the words spoken by the defendant were likely to arouse to immediate and violent anger the person to whom the words were addressed. *Hammond v. Adkisson*, 536 F.2d 237 (8th Cir. 1976) (decision under prior law).

Separate Offenses.

Uttering vulgar or profane language at the domicile of another and making violent threats against him there with an intent to insult or terrify him were distinct offenses and could not be joined in the same indictment. *State v. Lancaster*, 36 Ark. 55 (1880) (decision under prior law).

Cited: *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990); *Kirkendoll v. State*, 57 Ark. App. 321, 945 S.W.2d 400 (1997).

5-71-209. Harassing communications.

(a) A person commits the offense of harassing communications if, with the purpose to harass, annoy, or alarm another person, the person:

(1) Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written communication, in a manner likely to harass, annoy, or cause alarm;

(2) Makes a telephone call or causes a telephone to ring repeatedly, with no purpose of legitimate communication, regardless of whether a conversation ensues; or

(3) Knowingly permits any telephone under his or her control to be used for any purpose prohibited by this section.

(b) An offense involving use of a telephone may be prosecuted in the county where the defendant was located when he or she used a telephone, or in the county where the telephone made to ring by the defendant was located.

(c) Harassing communications is a Class A misdemeanor.

(d)(1) Upon the pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) This no contact order remains in effect during the pendency of any appeal of a conviction under this section.

(3) The judicial officer or prosecuting attorney shall provide a copy of this no contact order to the victim and arresting agency without unnecessary delay.

(e) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

History. Acts 1975, No. 280, § 2910; 379, § 6; 1993, No. 388, § 6; 1995, No. A.S.A. 1947, § 41-2910; Acts 1993, No. 1302, § 4.

RESEARCH REFERENCES

UALR L.J. Notes, Constitutional Law — The Domestic Abuse Act of 1989 — An Impermissible Expansion of Chancery Jurisdiction. *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), 13 UALR L.J. 537.

CASE NOTES

Evidence.

Defendant's conviction for harassing communications was appropriate where the state produced evidence that the caller, who left several harassing messages, identified himself as defendant, stated his address, acknowledged the courtesy notice placed at the address, and

expressed concern about the tree in his neighbor's yard. *Wynn v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 657 (Sept. 28, 2005).

Cited: *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986); *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990).

5-71-210. Communicating a false alarm.

(a) A person commits the offense of communicating a false alarm if he or she purposely initiates or circulates a report of a present, past, or impending bombing, fire, offense, catastrophe, or other emergency while knowing that the report is false or baseless and knowing that it is likely to:

(1) Cause action of any sort by an official or volunteer agency organized to deal with emergencies;

(2) Place any person in fear of physical injury to himself or herself or another person or of damage to his or her property or that of another person; or

(3) Cause total or partial evacuation of any occupiable structure, vehicle, or vital public facility.

(b)(1)(A) Communicating a false alarm is a Class C felony if physical injury to a person results.

(B) Communicating a false alarm is a Class D felony if:

(i) Damage to property results; or

(ii) The false alarm communicates a present or impending bombing and is made to or about a public or private educational institution.

(2)(A) If there is no resulting physical injury or damage to property, communicating a false alarm is a Class A misdemeanor.

(B) A second or subsequent offense that would otherwise be a Class A misdemeanor is a Class D felony.

(c) In addition to any other restitution ordered under § 5-4-205, the court may order that a person who violates this section make restitu-

tion to the State of Arkansas or any of its political subdivisions for any cleanup costs associated with the commission of the offense.

History. Acts 1975, No. 280, § 2911; A.S.A. 1947, § 41-2911; Acts 2001, No. 567, § 1; 2003, No. 1342, § 4.

A.C.R.C. Notes. Acts 2003, No. 1342, § 4, did not accurately engross the amendments to this section. Certain language was inadvertently deleted during the amendment process and added back by the Arkansas Code Revision Commission pursuant to a review.

Amendments. The 2001 amendment

redesignated the former (b) as present (b)(1) and (b)(2) and made related changes; added (b)(1)(B); substituted “communicating a false alarm” for “it” in (b)(2); and made minor stylistic and gender neutral changes throughout.

The 2003 amendment substituted “Class C felony” for “Class D felony” in (b)(1)(A); deleted former (b)(1)(B); and added present (b)(1)(B), (b)(2) and (c).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-71-211. Threatening a fire or bombing.

(a) A person commits the offense of threatening a fire or bombing if he or she purposely threatens damage or injury to the person or property of another person by bombing, fire, or other means, in a manner likely to:

(1) Place another person in reasonable apprehension of:

(A) Physical injury to that person or another person; or

(B) Damage to that person’s property or to the property of another person; or

(2) Create public alarm.

(b)(1) Threatening a fire or bombing is a Class D felony if physical injury to a person results.

(2) Otherwise, threatening a fire or bombing is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2912; A.S.A. 1947, § 41-2912.

5-71-212. Public intoxication — Drinking in public.

(a) A person commits the offense of public intoxication if he or she appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that:

(1) The person is likely to endanger himself or herself or another person or property; or

(2) The person unreasonably annoys a person in his or her vicinity.

(b) Public intoxication is a Class C misdemeanor.

(c) A person commits the offense of drinking in public if the person, other than in a place of business licensed to sell alcoholic beverages for consumption on the premises, consumes any alcoholic beverage:

(1) In any public place;

(2) On any highway or street;

(3) Upon any passenger coach, streetcar, or in or upon any vehicle commonly used for the transportation of passengers; or

(4) In or about any depot, platform, waiting station or room, or other public place.

(d) Drinking in public is a Class C misdemeanor.

(e) The provisions of this section shall not be construed to prohibit or restrict the consumption of an alcoholic beverage when consumed as a part of a recognized religious ceremony or ritual.

History. Acts 1975, No. 280, § 2913; 1975 (Extended Sess. 1976), No. 1155, §§ 1, 2; A.S.A. 1947, §§ 41-2913, 41-2913.1; reen. Acts 1987, No. 877, § 1.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 877, § 1. Acts 1987, No. 834, provided that 1987

legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Cross References. Beer and malt beverage education, § 3-5-1409.

CASE NOTES

ANALYSIS

Purpose.

Evidence.

Grounds for arrest.

Intoxication.

Public place.

Venue.

Purpose.

While the primary purpose of former statute against public drunkenness was to prevent annoyance to other members of the general public, the statute also served as a protection to the offender. *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964) (decision under prior law).

Evidence.

A conviction of appearing in drunken or intoxicated condition on a public highway was sustained by proof tending to show that the defendant was in an intoxicated condition on a certain road leading from a church which was being traveled by the public and also on a street in a certain town. *Simmons v. State*, 149 Ark. 348, 232 S.W. 597 (1921) (decision under prior law).

Evidence was sufficient to establish that defendant, charged with public drunkenness, was intoxicated. *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964) (decision under prior law).

Evidence sufficient to find that defendant was properly arrested for drinking in

public. *Taylor v. State*, 254 Ark. 620, 495 S.W.2d 532 (1973) (decision under prior law).

Evidence held sufficient, notwithstanding the absence of any tests to confirm the defendant's intoxication, where the defendant admitted that he had 2 drinks on the night of his arrest and the arresting officer testified that the defendant was "extremely intoxicated." *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998).

Grounds for Arrest.

Where the defendant fitted the description of a prowler, was found in the area in which the prowler was last seen, was unable to produce any identification and smelled strongly of alcohol, a police officer was justified in arresting him for intoxication. *Holmes v. State*, 262 Ark. 683, 561 S.W.2d 56 (1978).

Intoxication.

Instruction that one does not have to be under the influence of whiskey to such an extent as to become boisterous or stagger or be down drunk; that whenever the whiskey causes a man to be out of the ordinary in his general demeanor, it is sufficient under what the law terms in this case as intoxicated held proper. *Simmons v. State*, 149 Ark. 348, 232 S.W. 597 (1921) (decision under prior law).

Public Place.

One sitting in a motor vehicle near traveled portion of a highway was in a

“public place.” *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964) (decision under prior law).

Police officers who made an arrest for public intoxication in a private home were entitled to qualified immunity from the arrestee’s subsequent civil rights action based on a charge of wrongful arrest, even though the arrestee was subsequently acquitted on the charge of public intoxication, where the officers had probable cause to make the arrest when the drunken arrestee refused the homeowner’s request to leave her home, and where the Arkansas law concerning what constituted a “public place” in connection with a public intoxication offense was not well established at the time of the arrest so that the officers could not have known that their actions were improper. *Heslip v. Lobbs*, 554 F. Supp. 694 (E.D. Ark. 1982).

The definition of “public place” speaks

only to accessibility, not visibility. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

Where defendant was attending a private party and was drinking on the tailgate of a pickup parked in the side yard of the residence, defendant was not drinking in a “public place” as that term is used in subsection (c) of this section. *Weaver v. State*, 326 Ark. 82, 928 S.W.2d 798 (1996).

Venue.

It was proper to prove venue by evidence that the defendant while intoxicated was seen driving an automobile on the highway near the county line and that he was apparently going toward the county seat where he resided and where he occupied an official position. *McClain v. State*, 151 Ark. 266, 236 S.W. 263 (1922) (decision under prior law).

Cited: *Anable v. Ford*, 653 F. Supp. 22 (W.D. Ark. 1985).

5-71-213. Loitering.

(a) A person commits the offense of loitering if he or she:

(1) Lingers, remains, or prowls in a public place or the premises of another without apparent reason and under circumstances that warrant alarm or concern for the safety of persons or property in the vicinity and, upon inquiry by a law enforcement officer, refuses to identify himself or herself and give a reasonably credible account of his or her presence and purpose;

(2) Lingers, remains, or prowls in or near a school building, not having any reason or relationship involving custody of or responsibility for a student and not having written permission from anyone authorized to grant permission;

(3) Lingers or remains in a public place or on the premises of another for the purpose of begging;

(4) Lingers or remains in a public place for the purpose of unlawful gambling;

(5) Lingers or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual activity;

(6) Lingers or remains in a public place for the purpose of unlawfully buying, distributing, or using a controlled substance;

(7) Lingers or remains in a public place for the purpose of unlawfully buying, distributing, or consuming an alcoholic beverage;

(8) Lingers or remains on or about the premises of another for the purpose of spying upon or invading the privacy of another; or

(9) Lingers or remains on or about the premises of any off-site customer-bank communication terminal without any legitimate purpose.

(b) Among the circumstances that may be considered in determining whether a person is loitering are that the person:

- (1) Takes flight upon the appearance of a law enforcement officer;
- (2) Refuses to identify himself or herself; or
- (3) Manifestly endeavors to conceal himself or herself or any object.

(c) Unless flight by the actor or another circumstance makes it impracticable, prior to an arrest for an offense under subdivision (a)(1) of this section a law enforcement officer shall afford the actor an opportunity to dispel any alarm that would otherwise be warranted by requesting the actor to identify himself or herself and explain his or her presence and conduct.

(d) It is a defense to a prosecution under subdivision (a)(1) of this section if:

(1) The law enforcement officer did not afford the defendant an opportunity to identify himself or herself and explain his or presence and conduct; or

(2) It appears at trial that an explanation given by the defendant to the law enforcement officer was true and, if believed by the law enforcement officer at that time, would have dispelled the alarm.

(e) Loitering is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2914; A.S.A. 1947, § 41-2914; Acts 1995, No. 557, § 1; 1995, No. 1107, § 1.

Penalty for staying on premises after request to leave, § 4-70-101.

Cross References. Delinquent juveniles, § 9-27-301 et seq.

CASE NOTES

ANALYSIS

Construction with other law. Elements.

Construction With Other Law.

Defendant's motion to suppress evidence should have been granted because the stop and detention of defendant was impermissible under Ark. R. Crim. P. 3.1 where an officer only suspected defendant of the crime of loitering at the time he approached defendant; pursuant to subdivision (a)(6), the misdemeanor crime of loitering does not involve a danger of

forcible injury to persons or of appropriation of or damage to property. *Brazwell v. State*, 354 Ark. 281, 119 S.W.3d 499 (2003).

Elements.

Subdivision (a)(1) of this section requires that a person must both identify himself and give a reasonably credible account of his presence and purpose; failing to identify oneself is a separate element of the offense of loitering. *Johnson v. State*, 313 Ark. 308, 854 S.W.2d 336 (1993).

5-71-214. Obstructing a highway or other public passage.

(a) A person commits the offense of obstructing a highway or other public passage if, having no legal privilege to do so and acting alone or with another person, he or she renders any highway or other public passage impassable to pedestrian or vehicular traffic.

(b) It is a defense to a prosecution under this section that:

(1) The highway or other public passage was rendered impassable solely because of a gathering of persons to hear the defendant speak or otherwise communicate;

(2) The defendant was a member of a gathering contemplated by subdivision (b)(1)(A) of this section; or

(3) The highway or public passage obstructed has not been established as a city street, county road, or state or federal highway under the laws of this state and no civil court has established a right of passage by prescription for the highway or public passage.

(c) Obstructing a highway or other public passage is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2915; Throwing injurious materials upon highways, § 27-51-1405.
A.S.A. 1947, § 41-2915; Acts 1999, No. 1105, § 1.

Cross References. Obstruction of private road, § 27-66-404.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Law, 12
UALR L.J. 183.

CASE NOTES

ANALYSIS

In general.

Highway or public passage.

Legal privilege.

Obstructions.

In General.

Obstruction of a public road is illegal. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474, supp. op., 292 Ark. 322, 733 S.W.2d 723 (1987).

Highway or Public Passage.

Former section penalizing the obstruction of public roads was applicable only to county roads and not to public streets in a municipal corporation. *Saint Louis, I.M. & S. Ry. v. State*, 85 Ark. 131, 107 S.W. 668 (1908) (decision under prior law).

Evidence that a road which passed over the accused's land had been used by the public for many years and that for more than seven years the accused had constructed gates obstructing the road, that there was no dedication of the road and that it was never recognized as being part of any road district, failed to establish that the road was a "public road" so as to warrant a conviction under former section penalizing the obstruction of any public

road. *Simpson v. State*, 210 Ark. 309, 195 S.W.2d 545 (1946) (decision under prior law).

Legal Privilege.

One who purchased lands over which a public road had been dedicated by the former owners by a bill of assurance on file in the recorder's office was held to have notice thereof and to be liable for its obstruction. *Finney v. State*, 172 Ark. 115, 287 S.W. 744 (1926) (decision under prior law).

Obstructions.

It was error to permit a landowner to maintain three gates across a roadway and require users to close two of such gates without requiring the landowner to construct cattle guards to permit the passages of automobiles or trucks without opening the gates. *Hatchett v. Currier*, 249 Ark. 829, 461 S.W.2d 934 (1971) (decision under prior law).

Cited: *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977); *Madewell v. State*, 290 Ark. 580, 720 S.W.2d 913 (1986); *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988); *Hagen v. State*, 318 Ark. 139, 883 S.W.2d 832 (1994).

5-71-215. Defacing objects of public respect.

(a) A person commits the offense of defacing objects of public respect if he or she purposely:

- (1) Defaces, mars, or otherwise damages any public monument;
- (2) Defaces, mars, or otherwise damages a work of art on display in any public place;
- (3) Defaces, mars, desecrates, or otherwise damages any place of worship, cemetery, or burial monument; or
- (4) Removes a broken or unbroken, commercial or rock grave marker for any reason except for cleaning or repair by a family member, caretaker, or preservation organization.

(b)(1) Defacing objects of public respect is a Class A misdemeanor if the value of repairing or replacing the damaged object does not exceed five hundred dollars (\$500).

(2) Defacing objects of public respect is a Class D felony if the value of repairing or replacing the damaged object exceeds five hundred dollars (\$500), but does not exceed two thousand five hundred dollars (\$2,500).

(3) Defacing objects of public respect is a Class C felony if the value of repairing or replacing the damaged object exceeds two thousand five hundred dollars (\$2,500).

History. Acts 1975, No. 280, § 2916; A.S.A. 1947, § 41-2916; Acts 1993, No. 169, § 1; 2005, No. 2232, § 4.

Amendments. The 2005 amendment

inserted “or she” in (a); and added (a)(4) and made related changes.

Cross References. Flag desecration, § 5-51-207.

CASE NOTES

ANALYSIS

Evidence.

Intent.

Mistake.

Ownership and use.

Evidence.

Evidence held insufficient to sustain a conviction. *Mitchell v. State*, 187 Ark. 1163, 58 S.W.2d 205 (1933); *Giles v. State*, 190 Ark. 218, 78 S.W.2d 70 (1935) (preceding decisions under prior law).

Intent.

An intent to injure someone was not an ingredient of this crime. *Saffell v. State*, 113 Ark. 97, 167 S.W. 483 (1914) (decision under prior law).

A malicious act within the meaning of former section concerning injury to graves or monuments was an unlawful and wrongful act intentionally, willfully and purposefully done without legal justifica-

tion or excuse, evidence of which could have been inferred from the acts committed or words spoken. *Cooper v. State*, 246 Ark. 368, 438 S.W.2d 681 (1969) (decision under prior law).

Mistake.

Persons acting in good faith in tearing down a schoolhouse were not guilty of the misdemeanor defined in former section penalizing anyone who willfully injured any church, lodge or other property used for public purposes. *Thompson v. State*, 151 Ark. 369, 236 S.W. 608 (1922) (decision under prior law).

Ownership and Use.

It was not necessary to name the owners of the property, and a person could have been held guilty of damaging church property although the building was also used as a schoolhouse. *Saffell v. State*, 113 Ark. 97, 167 S.W. 483 (1914) (decision under prior law).

5-71-216. Defacing public buildings.

(a) A person commits the offense of defacing a public building if he or she purposely defaces, mars, or otherwise damages a public building.

(b) Defacing a public building is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2917; A.S.A. 1947, § 41-2917.

5-71-217 — 5-71-224. [Reserved.]**5-71-225. [Repealed.]**

Publisher's Notes. This section, concerning picketing or demonstrating before a private residence, was repealed by Acts 2005, No. 1994, § 523. The section was

derived from Acts 1969, No. 160, §§ 1-3; A.S.A. 1947, §§ 41-2966 — 41-2968; Acts 1989, No. 840, § 1.

5-71-226. Disruption of campus activities.

(a)(1) It is unlawful for any group composed of two (2) or more persons to act jointly with one another or attempt any action in conjunction with one another at a public, private, or parochial school or college of this state, to:

(A) Obstruct or bar any hallway or door of any campus building or facility;

(B) Seize control of a campus building or facility;

(C) Prevent the meeting of or cause the disruption of any class; or

(D) Erect any type of barricade aimed at obstructing the orderly passage of a person or vehicle onto or off of a campus ground.

(2) However, nothing stated in this section applies to an activity of any labor organization or teachers' organization.

(b) Any person convicted of violating any provision of this section is guilty of a Class A misdemeanor.

History. Acts 1969, No. 345, §§ 1, 2; A.S.A. 1947, §§ 41-2969, 41-2970; Acts 2005, No. 1994, § 352.

Amendments. The 2005 amendment substituted "Class A misdemeanor" for "misdemeanor and, in addition to any lawful penalty imposed by the institution on

any student participating in conduct prohibited by this section, shall be subject to a fine of not less than two hundred dollars (\$200) or imprisonment in the county jail for a period of not less than six (6) months, or both" in (b).

5-71-227. [Repealed.]

Publisher's Notes. This section, concerning the possession of a paging device by students, was repealed by Acts 2001,

No. 252, § 1. The section was derived from Acts 1989, No. 146, § 2.

5-71-228. Obstruction of shooting, hunting, fishing, or trapping activities.

(a)(1) It is unlawful for any person to willfully obstruct or impede the participation of any individual in the lawful activity of shooting, hunting, fishing, or trapping in this state.

(2) Nothing in this section prohibits a landowner or lessee from exercising his or her lawful right to prohibit hunting, fishing, or trapping on his or her land, or from exercising any other legal right.

(b)(1) A court of general jurisdiction may enjoin conduct that would be in violation of subsection (a) of this section upon petition by a person affected or who reasonably may be affected by the conduct upon a showing that the conduct is threatened or that it has occurred on a particular premises in the past and that it is not unreasonable to expect that under similar circumstances the conduct will be repeated.

(2)(A) A court of general jurisdiction may award damages, that may include an award for punitive damages, to any person adversely affected by a violation of subsection (a) of this section.

(B) In addition to any other item of special damages, the measure of damages may include expenditures of the affected person for license and permit fees, travel, guides, special equipment, and supplies, to the extent that the expenditures were rendered futile by prevention of taking of a wild animal or fish.

(c)(1)(A) Any person violating a provision of this section and in possession of a firearm is guilty of a Class A misdemeanor.

(B) Otherwise, a violation of this section is a Class B misdemeanor.

(2) If the person violating this section holds an Arkansas hunting, fishing, or trapping license at the time of conviction, the license is revoked.

(d) This section does not prevent any wildlife officer or other law enforcement officer from performing his or her duties.

History. Acts 1991, No. 149, §§ 1-4; 2005, No. 1994, § 483.

A.C.R.C. Notes. References to “this chapter” in subchapters 1 and §§ 5-71-201 — 5-71-207 may not apply to this section which was enacted subsequently.

Amendments. The 2005 amendment redesignated former (c) as present (c)(1) and (c)(2); in (c)(1), inserted “and in possession of a firearm” and substituted

“Class A misdemeanor, otherwise it is a Class B misdemeanor” for “and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), or imprisonment for not to exceed thirty (30) days, or both, and if”; and, in present (c)(2), substituted “If such a person” for “such person,” and “the license” for “such license.”

CASE NOTES**Appeals.**

Defendant, who harassed hunters and scared game by blowing a whistle and firing shots, was prevented from appealing his conviction of obstruction of shoot-

ing, hunting, fishing, or trapping activities because he failed to preserve for review his claims as to the constitutionality of this section. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003).

5-71-229. Stalking.

(a)(1) A person commits stalking in the first degree if he or she purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury or placing that person in imminent fear of the death or serious bodily injury of his or her immediate family and the person:

(A) Does so in contravention of an order of protection consistent with The Domestic Abuse Act of 1991, § 9-15-101 et seq., or a no contact order as set out in subdivision (a)(2)(A) of this section, protecting the same victim, or any other order issued by any court protecting the same victim;

(B) Has been convicted within the previous ten (10) years of:

(i) Stalking in the second degree;

(ii) Violating § 5-13-301 or § 5-13-310; or

(iii) Stalking or threats against another person's safety under the statutory provisions of any other state jurisdiction; or

(C) Is armed with a deadly weapon or represents by word or conduct that he or she is armed with a deadly weapon.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) This no contact order remains in effect during the pendency of any appeal of a conviction under subsection (a) of this section.

(C) The judicial officer or prosecuting attorney shall provide a copy of this no contact order to the victim and the arresting agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(3) Stalking in the first degree is a Class B felony.

(b)(1) A person commits stalking in the second degree if he or she purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury or placing that person in imminent fear of the death or serious bodily injury of his or her immediate family.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) This no contact order remains in effect during the pendency of any appeal of a conviction under subsection (b) of this section.

(C) The judicial officer or prosecuting attorney shall provide a copy of this no contact order to the victim and arresting agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(3) Stalking in the second degree is a Class C felony.

(c) It is an affirmative defense to prosecution under this section if the actor is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his or her duty while conducting surveillance on an official work assignment.

(d) As used in this section:

(1)(A) "Course of conduct" means a pattern of conduct composed of two (2) or more acts separated by at least thirty-six (36) hours, but occurring within one (1) year.

(B)(i) "Course of conduct" does not include constitutionally protected activity.

(ii) If the defendant claims that he or she was engaged in a constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence;

(2) "Harasses" means an act of harassment as defined by § 5-71-208; and

(3) "Immediate family" means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household or who, within the prior six (6) months, regularly resided in the household.

History. Acts 1993, No. 379, §§ 1-3; 201 — 5-71-227 may not apply to this section which was enacted subsequently. 1993, No. 388, §§ 1-3; 1995, No. 1302, § 1.

A.C.R.C. Notes. References to "this chapter" in subchapters 1 and §§ 5-71-5-71-227 may not apply to this section which was enacted subsequently.

Cross References. Terroristic threatening, § 5-13-301.

Terroristic act, § 5-13-310.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 16 UALR L.J. 91.

CASE NOTES

ANALYSIS

Course of conduct.

Evidence.

Harasses.

Terroristic threat.

Course of Conduct.

"Course of conduct" as used in subdivision (b)(1) means a pattern of conduct

composed of two or more acts separated by at least 36 hours but occurring within one year. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

This section does not require that a person first be subjected to conduct warranting an order of protection or an order of no contact and then endure at least two more acts separated by at least 36 hours

before charges of stalking in the first degree can be filed. *Moses v. State*, 72 Ark. App. 357, 39 S.W.3d 459 (2001).

Evidence.

Where the trial judge, in hearing the defendant's several answering machine messages to the victim, reasonably found that the defendant intended to terrorize the victim with threats of harm, substantial evidence existed to support defendant's conviction for second degree stalking. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

Evidence established that the defendant threatened physical injury to the victim or her immediate family where the victim testified that the defendant called her repeatedly and persistently after she tried to terminate her relationship with him, that he threatened to find her husband and kill him, and that he told her, "You can get me arrested but that'll be the last thing you do." *Dye v. State*, 70 Ark. App. 329, 17 S.W.3d 505 (2000).

Where a witness testified that defendant chased the victim in his car, and the victim testified that defendant followed her in his car on several occasions, blocked the victim's car in her drive, and threatened to kill the victim, the evidence of

defendant's guilt on the stalking charge was overwhelming and the improper admission of the unavailable officer's testimony was harmless as to the offense of second-degree stalking, subdivision (b)(1) of this section. *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Evidence was sufficient to sustain defendant's stalking conviction where there was evidence of terroristic threats to "burn" the victim, along with numerous incidents of harassment, vandalism, and other hostile acts directed toward the victim and her family. *Lowry v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 279 (Mar. 23, 2005).

Harasses.

The term "harasses" employed in subdivision (b)(1) means acts of harassment as defined in § 5-71-208. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

Terroristic Threat.

The use of the term "terroristic threat" when defining the crime of stalking does not require that it be shown that the accused has the immediate ability to carry out the threats. *Wesson v. State*, 320 Ark. 380, 896 S.W.2d 874 (1995).

Cited: *Kirkendoll v. State*, 57 Ark. App. 321, 945 S.W.2d 400 (1997).

SUBCHAPTER 3 — PROMOTING CIVIL DISORDER

SECTION.

5-71-301. Definitions.

5-71-302. Promoting civil disorder in the first degree.

SECTION.

5-71-303. Unaffected lawful uses of weapons.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

5-71-301. Definitions.

As used in this subchapter:

(1) "Civil disorder" means any public disturbance involving an act of violence by an assemblage of three (3) or more persons that causes an immediate danger of or results in damage or injury to the property or person of any other individual;

(2) "Explosive or incendiary device" includes:

- (A) Dynamite and any other form of a high explosive;
- (B) Any explosive bomb, grenade, missile, or similar device;

(C) An explosive material, meaning:

- (i) An explosive;
- (ii) A blasting agent; and
- (iii) A detonator; and

(D) Any incendiary bomb or grenade, fire bomb, or similar device, and including any device that consists of or includes a breakable container containing a flammable liquid or compound and a wick composed of any material that when ignited is capable of igniting the flammable liquid or compound, and can be carried or thrown by one

(1) individual acting alone; and

(3) "Firearm" means the same as defined in § 5-1-102.

History. Acts 1985, No. 903, § 1;
A.S.A. 1947, § 41-2926; Acts 1995, No.
989, § 1.

5-71-302. Promoting civil disorder in the first degree.

(1) Any person who teaches or demonstrates to any other person the use, application, or construction of any firearm or explosive or incendiary device capable of causing injury or death to any person, knowing or intending that the firearm or explosive or incendiary device be used in furtherance of a civil disorder is guilty of the crime of promoting civil disorder in the first degree.

(2) Promoting civil disorder in the first degree is a Class C felony.

History. Acts 1985, No. 903, § 2;
A.S.A. 1947, § 41-2927.

5-71-303. Unaffected lawful uses of weapons.

Nothing in this subchapter shall be construed to prohibit the training or teaching of the use of a weapon for:

- (1) A law enforcement purpose;
- (2) Hunting;
- (3) Recreation;
- (4) Competition; or
- (5) Any other lawful use or activity.

History. Acts 1985, No. 903, § 3;
A.S.A. 1947, § 41-2928.

CHAPTER 72

WATER AND WATERCOURSES

SECTION.

5-72-101. [Repealed.]

5-72-102. Removal of trees growing on
navigable rivers or
streams.

5-72-103. Cutting timber on swamp and

SECTION.

overflowed lands.

5-72-104. Leaving timber in navigable
stream, drainage ditch, or
stream bed.

5-72-105. Obstruction of drains by timber

SECTION.

or material — Floating
logs or boom.

5-72-106. Obstructing natural drains.

5-72-107. Keeping dams sufficiently
open.

5-72-108. Injuring or destroying bridges,

SECTION.

dams, levees, or embank-
ments.

5-72-109. Injuring levees.

5-72-110. Driving on levees — Destruc-
tion of barricades.

5-72-111. [Repealed.]

Cross References. Criminal mischief,
§§ 5-38-203, 5-38-204.

Preambles. Acts 1971, No. 142, con-
tained a preamble which read: "Whereas,
the natural environment is rapidly deteri-
orating in many areas of the State; and

"Whereas, this deterioration is espe-
cially severe in the alluvial areas adjacent
to navigable rivers and streams; and

"Whereas, in certain areas of the State
the only trees of any size that are still
standing are those cypress trees and other
water tolerant trees below the normal
high water mark on navigable rivers and
streams; and

"Whereas, the beds of navigable rivers
and streams and all land lying below the
normal high water mark of such streams
belong to the State of Arkansas;

"Now, therefore ..."

Effective Dates. Acts 1857, p. 166,
§ 3: effective on passage.

Acts 1861, No. 115, § 2: effective on
passage.

Acts 1873, No. 118, § 6: effective on
passage.

Acts 1875, No. 93, § 2: effective 90 days
after passage.

Acts 1899, No. 76, § 2: effective 30 days
after passage.

Acts 1905, No. 320, § 4: effective on
passage.

Acts 1909, No. 296, § 3: effective on
passage.

Acts 1927, No. 158, § 3: effective on
passage.

RESEARCH REFERENCES

Ark. L. Rev. Lex Aquae Arkansas, 27
Ark. L. Rev. 429.

Land Use — Wetlands Regulation, 27
Ark. L. Rev. 527.

5-72-101. [Repealed.]

Publisher's Notes. This section, con-
cerning poisoning a lake or stream, was
repealed by Acts 2005, No. 1994, § 524.
The section was derived from Acts 1861,

No. 115, § 1, p. 242; C. & M. Dig., § 2540;
Pope's Dig., § 3187; A.S.A. 1947, § 41-
4055.

5-72-102. Removal of trees growing on navigable rivers or streams.

(a)(1) It is unlawful to remove any tree growing below the ordinary
high watermark, as defined in § 15-22-202, on any river or stream in
this state that has been designated as a navigable river or stream by a
legislative act.

(2) However, an authorized representative of the United States
Government or of this state that is charged with the responsibility of
maintaining navigation and flood control on navigable rivers and
streams may remove a tree growing below the ordinary high watermark

of a navigable river or stream as the authorized representative deems necessary to properly carry out the authorized representative's duties.

(b) Any person violating a provision of this section is guilty of a violation and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

History. Acts 1971, No. 142, §§ 1, 2; A.S.A. 1947, §§ 41-4068, 41-4069; Acts 2005, No. 1994, § 468.

Amendments. The 2005 amendment, in (b), substituted "violation" for "misde-

meanor" and "one hundred dollars (\$100)" for "ten dollars (\$10.00)."

Cross References. Removal of timber from beds or bars of navigable streams without permit, § 22-5-803.

5-72-103. Cutting timber on swamp and overflowed lands.

(a) Any person who cuts, destroys, or removes any timber standing on any of the swamp and overflowed lands granted by the United States Congress to this state is subject to indictment and upon conviction is guilty of a Class B misdemeanor.

(b) Additionally, restitution is set at the full value of the timber cut, destroyed, or carried away.

History. Acts 1853, § 35, p. 161; C. & M. Dig., § 2547; Pope's Dig., § 3194; A.S.A. 1947, § 10-301; Acts 2005, No. 1994, § 468.

Amendments. The 2005 amendment deleted the subsection (a) designation; substituted "guilty of a Class B misdemeanor. Additionally, restitution shall be

set at full value of the timber cut, destroyed, or carried away" for "fined the full value of the timber cut, destroyed, or carried away and be imprisoned not less than two (2) nor more than twenty (20) days"; and deleted former (b).

Cross References. Actions by state for trespass, § 16-106-105.

5-72-104. Leaving timber in navigable stream, drainage ditch, or stream bed.

(a) It is unlawful for any person, partnership, company, or corporation cutting any timber or tree in this state to leave any tree top, tree trunk, or tree limb in any navigable stream, drainage ditch, or stream bed of any improved drainage project.

(b)(1) Any person, partnership, company, or corporation violating a provision of this section is guilty of a Class B misdemeanor.

(2) Each violation of this section constitutes a separate offense.

History. Acts 1965, No. 91, §§ 1, 2; A.S.A. 1947, §§ 41-4066, 41-4067; Acts 2005, No. 1994, § 383.

Amendments. The 2005 amendment substituted "Class B misdemeanor" for "misdemeanor and upon conviction shall

be subject to a fine of not less than twenty-five dollars (\$25.00) nor more than two hundred fifty dollars (\$250) or imprisonment for not less than ten (10) days nor more than ninety (90) days, or both fine and imprisonment" in (b).

5-72-105. Obstruction of drains by timber or material — Floating logs or boom.

(a)(1) It is unlawful for any person or corporation to cause any timber, tree, or material to be felled or thrown into any ditch, drain, stream, or canal, whether natural or artificial, that tends to obstruct the free flow of water in the ditch, drain, stream, or canal.

(2) However, this subsection does not prevent any person from floating a log or having a boom in any natural stream in this state if the floating of the log or use of the boom does not tend to overflow the land adjacent to the boom.

(b)(1) Any person, levee district, or drainage district interested in the maintenance of the free flow of water through any stream, drain, ditch, or canal, may remove any timber, tree, or material in the stream, ditch, drain, or canal that tends to obstruct the free flow of water.

(2) The person, levee district, or drainage district has a cause of action against any person or corporation that may have felled or thrown, or caused to be felled or thrown timber, a tree, or material into a stream, drain, ditch, or canal, for the reasonable cost of removing the timber, tree, or material, whether the obstruction was placed in the stream, ditch, drain, or canal either before or after the passage of this section.

(c) Any person or corporation that violates subsection (a) of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

History. Acts 1905, No. 320, §§ 1-3, p. 764; C. & M. Dig., §§ 3662-3664; Pope's Dig., §§ 4513-4515; A.S.A. 1947, §§ 21-406 — 21-408; Acts 2005, No. 1994, § 469.

Publisher's Notes. With reference to the phrase "passage of this section," Acts 1905, No. 320, was signed by the Governor and became effective on May 6, 1905.

Amendments. The 2005 amendment, in (c), substituted "violation" for "misdemeanor," "one hundred dollars (\$100)" for "ten dollars (\$10.00)" and "one thousand dollars (\$1,000)" for "five hundred dollars (\$500)."

Cross References. Penalty for obstructing drains, § 14-121-105.

CASE NOTES

ANALYSIS

Cause of action.
Injunctions.

Cause of Action.

The right conferred by subsection (b) is a continuing one. *Beck v. State ex rel. Att'y Gen.*, 179 Ark. 102, 14 S.W.2d 1101 (1929).

Injunctions.

The pollution of a stream will be enjoined. *Meriwether Sand & Gravel Co. v. State ex rel. Att'y Gen.*, 181 Ark. 216, 26 S.W.2d 57 (1930).

One whose land was drained by a slough flowing thence across the land of another was entitled to a mandatory injunction to compel such other landowner to remove a levee which he built across the slough in such a way that it obstructed the drainage of plaintiff's land. *Solomon v. Congleton*, 245 Ark. 487, 432 S.W.2d 865 (1968).

Cited: *Lee-Phillips Drainage Dist. v. Beaver Bayou Drainage Dist.*, 226 Ark. 105, 289 S.W.2d 192 (1956).

5-72-106. Obstructing natural drains.

(a) It is unlawful for any person to obstruct in any manner any natural drain in this state.

(b) Any person that obstructs in violation of subsection (a) of this section any natural drain is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

(c) This section does not apply to the following counties:

- (1) Craighead county;
- (2) Lee county;
- (3) Phillips county; and
- (4) Woodruff county.

History. Acts 1909, No. 296, §§ 1, 2, p. 897; C. & M. Dig., § 2758; Pope's Dig., § 3440; Acts 1971, No. 43, § 1; A.S.A. 1947, §§ 41-4051, 41-4052; Acts 2005, No. 1994, § 469.

Amendments. The 2005 amendment,

in (b), substituted "violation" for "misdemeanor," "one hundred dollars (\$100)" for "ten dollars (\$10.00)" and "one thousand dollars (\$1,000)" for "one hundred dollars (\$100)."

CASE NOTES**Levee.**

Where the city's proposed levee would not block a natural watercourse, the increased water elevation on the plaintiffs' properties caused by the proposed levee would be de minimis, and where the city had sufficient funds to compensate the plaintiffs for any damage to their property

and to maintain the levee, construction of the levee was not enjoined. *Scroggin v. City of Grubbs*, 318 Ark. 648, 887 S.W.2d 283 (1994).

Cited: *Saint Louis, I.M. & S. Ry. v. Board of Dirs.*, 103 Ark. 127, 145 S.W. 892 (1912).

5-72-107. Keeping dams sufficiently open.

(a) Any person owning, operating, or controlling any dam or other obstruction across any river, creek, or other stream in this state shall at all times keep the dam or other obstruction open so as to permit a flow of water sufficient to maintain fish life in the stream below the dam or other obstruction.

(b) Any person violating a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

History. Acts 1927, No. 158, §§ 1, 2; Pope's Dig., §§ 3667, 3668, 5975, 5976, 14491, 14492; A.S.A. 1947, §§ 41-4053, 41-4054; Acts 2005, No. 1994, § 469.

Amendments. The 2005 amendment,

in (b), substituted "violation" for "misdemeanor" and "one thousand dollars (\$1,000)" for "five hundred dollars (\$500)."

Cross References. Preventing passage of fish prohibited, § 15-44-110.

5-72-108. Injuring or destroying bridges, dams, levees, or embankments.

Any person who willfully and maliciously cuts down, breaks, injures, or destroys any bridge, mill-dam or other dam, or levee erected or constructed to create hydraulic power or to prevent the overflow of lands or any embankment necessary to support the dam or levee or makes or causes to be made any aperture in the dam or embankment with intent to destroy or injure the dam or embankment is guilty of a violation and upon conviction shall be fined in any sum not exceeding five thousand dollars (\$5,000).

History. Rev. Stat., ch. 44, div. 4, art. 9, § 4; C. & M. Dig., § 2530; Pope's Dig., § 3180; A.S.A. 1947, § 41-4056; Acts 2005, No. 1994, § 57.

Amendments. The 2005 amendment substituted "violation" for "misdemeanor."

5-72-109. Injuring levees.

(a) Should any person cut, break, or in any way damage any public levee constructed or to be constructed, by authority of this state, or paid for or to be paid for, out of any funds of this state, or out of the funds of any county or public corporation, in whole or in part, that person is guilty of a Class D felony.

(b)(1) Any person who enters upon the premises of another and willfully and maliciously cuts down, breaks, or destroys any levee erected or constructed to prevent the overflow of lands, or any embankment necessary to support the levee, with intent to destroy or injure the levee or embankment, is guilty of a felony.

(2) However, nothing in this section shall be construed to protect any levee or embankment obstructing or damming a running stream or natural outlet for the water so as to injure another person, unless the levee or embankment has been condemned to public use in the manner provided by the Arkansas Constitution and laws of the state.

History. Acts 1874 (Spec. Sess.), No. 27, §§ 1-3, p. 37; C. & M. Dig., §§ 2747-2749; Pope's Dig., §§ 3430-3432; A.S.A. 1947, §§ 41-4057 — 41-4059; Acts 2005, No. 1994, § 431.

Amendments. The 2005 amendment substituted "that person shall be guilty of a Class D felony" for "he so offending shall be deemed guilty of a felony" in (a); and deleted former (c).

5-72-110. Driving on levees — Destruction of barricades.

(a) If any public levee or any private levee is constructed and maintained for the purpose of protection against overflow, any person who drives any vehicle or rides on the levee without the consent of the owner, using the levee as a road bed, or who cuts, tears down, destroys, or injures a barricade, fence, or other construction erected or built for the protection of the levee, is guilty of a Class B misdemeanor.

(b) The provisions of this section do not apply to an instance in which:

(1) A road has been laid out by a lawful authority upon a levee that has ceased to be of any practical use to the county in the rear of the levee; or

(2) A lawful authority has established a crossing over the levee.

History. Acts 1873, No. 118, §§ 1-4, p. 282; 1875, No. 93, § 1, p. 210; 1893, No. 74, § 1, p. 118; 1899, No. 76, § 1, p. 130; C. & M. Dig., § 2750; Pope's Dig., § 3433; A.S.A. 1947, §§ 41-4060 — 41-4063; Acts 2005, No. 1994, § 470.

Amendments. The 2005 amendment substituted "Class B misdemeanor" for "misdemeanor and on conviction shall be fined any sum not less than five dollars

(\$5.00) nor more than fifty dollars (\$50.00) or imprisonment in the county jail not less than five (5) nor more than thirty (30) days, or both, at the discretion of the court having jurisdiction" in (a); deleted former (b) and (c); redesignated former (d) as present (b); in present (b)(1), substituted "lawful" for "properly constituted" and added "or" at the end; and substituted "lawful" for "proper" in present (b)(2).

5-72-111. [Repealed.]

Publisher's Notes. This section, concerning making cutoffs on the Mississippi River, was repealed by Acts 2005, No. 1994, § 546. The section was derived from

Acts 1857, §§ 1, 2, p. 166; C. & M. Dig., §§ 3665½, 3666; Pope's Dig., §§ 4517, 4518; A.S.A. 1947, §§ 41-4064, 41-4065.

CHAPTER 73

WEAPONS

SUBCHAPTER.

1. POSSESSION AND USE GENERALLY.
2. UNIFORM MACHINE GUN ACT.
3. CONCEALED HANDGUNS.
4. CONCEALED HANDGUN LICENSE RECIPROCITY.

A.C.R.C. Notes. References to "this chapter" in subchapters 1 and 2 may not

apply to § 5-73-128 or subchapters 3 or 4 which were enacted subsequently.

RESEARCH REFERENCES

Am. Jur. 79 Am. Jur. 2d, Weapons, § 7 et seq.

C.J.S. 94 C.J.S., Weapons, § 3 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

SUBCHAPTER 1 — POSSESSION AND USE GENERALLY

SECTION.

- 5-73-101. Definitions.
 5-73-102. Possessing instrument of crime.
 5-73-103. Possession of firearms by certain persons.

SECTION.

- 5-73-104. Criminal use of prohibited weapons.
 5-73-105. Legitimate manufacture, repair, and transportation of prohibited weapons.

SECTION.

- 5-73-106. Defacing a firearm.
- 5-73-107. Possession of a defaced firearm.
- 5-73-108. Criminal acts involving explosives.
- 5-73-109. Furnishing a deadly weapon to a minor.
- 5-73-110. Disarming minors and mentally defective or irresponsible persons — Disposition of property seized.
- 5-73-111 — 5-73-118. [Reserved.]
- 5-73-119. Handguns — Possession by minor or possession on school property.
- 5-73-120. Carrying a weapon.
- 5-73-121. Carrying a knife as a weapon.
- 5-73-122. Carrying a firearm in publicly owned buildings or facilities.
- 5-73-123. [Repealed.]
- 5-73-124. Tear gas — Pepper spray.

SECTION.

- 5-73-125. Interstate sale and purchase of shotguns, rifles, and ammunition.
- 5-73-126. Booby traps.
- 5-73-127. Possession of loaded center-fire weapons in certain areas.
- 5-73-128. Offenses upon property of public schools.
- 5-73-129. Furnishing a handgun or a prohibited weapon to a felon.
- 5-73-130. Seizure and forfeiture of firearm — Seizure and forfeiture of motor vehicle — Disposition of property seized.
- 5-73-131. Possession or use of weapons by incarcerated persons.
- 5-73-132. Sale, rental, or transfer of firearm to person prohibited from possessing firearms.
- 5-73-133. Possession of a taser stun gun.

Cross References. Confiscation and destruction of deadly weapons, § 16-90-119.

Disorderly conduct, § 5-71-207.

Fines, § 5-4-201.

Term of imprisonment, § 5-4-401.

Preambles. Acts 1969, No. 159, contained a preamble which read: "Whereas, the Secretary of the Treasury of the United States of America is charged with the administration of the Federal Gun Control Act of 1968; and

"Whereas, regulations issued pursuant to said Act provide with respect to the sale of ammunition to out-of-state residents and sales of shotguns and rifles; and

"Whereas, preliminary regulations indicated that the sale of ammunition to residents of bordering states would not be prohibited. However, the regulation promulgated recently would prohibit the sale of ammunition and shotguns and rifles to residents of adjacent states unless the state in which such ammunition or shotgun or rifle is sold indicates its assent to such sales; and

"Whereas, there are many sportsmen from the states of Missouri, Tennessee, Mississippi, Louisiana, Texas and Oklahoma who frequently visit the State of Arkansas to hunt the game which abounds in this State; and

"Whereas, it would be a great inconvenience to those persons and an economic detriment to this State, if they were prohibited from purchasing ammunition and shotguns and rifles in the State of Arkansas; and

"Whereas, it is the intent of the General Assembly to authorize the sale of ammunition and shotguns and rifles to residents of adjacent states;

"Now, therefore ..."

Effective Dates. Acts 1881, No. 96, § 8: effective 90 days after passage.

Acts 1907, No. 132, § 3: effective on passage.

Acts 1949, No. 338, § 4: approved Mar. 21, 1949. Emergency clause provided: "It is hereby found and declared that the promiscuous possession, use and discharge of tear gas constitutes a serious hazard to the health and well-being of the people of this State; it is therefore declared that an emergency exists and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in force from and after its passage."

Acts 1953, No. 43, § 2: became law without Governor's signature, Feb. 9, 1953. Emergency clause provided: "This Act being necessary for the preservation of the public peace, health and safety, an emergency is declared, and this Act takes effect from and after its passage."

Acts 1969, No. 159, § 3: Mar. 4, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that under administrative regulations issued by the Secretary of the Treasury of the United States, charged with administration and enforcement of the Federal Gun Control Act of 1968, affirmative State action must be taken to authorize the sale of ammunition, shotguns and rifles in the State to residents of adjacent states, and that, unless appropriate State action is taken, such sales are illegal. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, is declared to be in full force and effect from and after the date of its passage and approval."

Acts 1973, No. 54, § 3: Feb. 5, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly of Arkansas that the manufacture and sale of certain knives has brought much favorable publicity to this State, that the prohibitions placed upon the sale of Bowie knives are unneeded and have greatly restricted the manufacture and sale of this historic knife; that the immediate removal of such restrictions would have a favorable impact upon the economy of this State. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from the date of its passage and approval."

Acts 1985, Nos. 243 and 399, § 3: Mar. 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that law enforcement officers are with increasing frequency locating booby traps designed to injure people and thereby deter the investigation of unlawful activities, especially those relating to illegal drugs; that there presently is no law prohibiting the installation of booby traps, and that this Act is immediately necessary to protect the public as well as law enforcement officers from injury caused by booby traps. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 74, § 3: Feb. 19, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that any person who has been convicted of a felony or adjudicated a mental defective or involuntarily committed to a mental institution may not possess or own any firearms; that this language is unfairly broad and that a mechanism should be devised whereby persons who constitute no danger to themselves or others should not be restricted for the duration of their lives from owning or possessing firearms; that this Act establishes a mechanism to allow the Governor or the Bureau of Alcohol, Tobacco and Firearms to determine which such persons should be relieved of such restriction; that the inequity of the present law will continue until this Act becomes effective. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 649, § 7: Mar. 17, 1989. Emergency clause provided: It is found and determined by the General Assembly that the possession of handguns by young Arkansans contributes substantially to the commission of crimes and injuries to innocent persons, and that the possession of such weapons by persons on school property has resulted in numerous recent injuries and deaths. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage.

Acts 1993, No. 264, § 7: Feb. 26, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that additional enforcement mechanisms are urgently needed to deter persons under nineteen (19) years of age from illegally using or possessing prohibited weapons upon the property of the public schools or in or upon any school bus; that this act provides an additional enforcement mechanism; and that this act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use or possession of prohibited weapons in the public schools. Therefore, an emergency is hereby declared to exist, and

this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 781, § 7: Mar. 29, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that additional enforcement mechanisms are urgently needed to deter persons under nineteen (19) years of age from illegally using or possessing prohibited weapons upon the property of the public schools or in or upon any school bus; and this Act provides an additional enforcement mechanism; and that this Act should go into effect immediately in order to grant law enforcement officers and courts greater flexibility in dealing with the illegal use or possession of prohibited weapons in the public schools. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 41 and 42, § 5: Aug. 25, 1994. Emergency clause provided: "It is hereby found and determined by the General Assembly that felons commit many serious criminal offenses by the use of handguns or by the use of prohibited weapons; that the criminal penalties for furnishing handguns and prohibited weapons to felons must be increased in order to decrease the availability of such weapons. Therefore in order to immediately enhance the penalties for furnishing handguns or prohibited weapons to a felon, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), No. 45, § 6: Aug. 25, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that minors commit many serious criminal offenses by the use of deadly weapons or by the use of prohibited weapons. The criminal penalties for furnishing deadly weapons to minors and for furnishing prohibited weapons, must be increased in

order to decrease the availability of such weapons. Therefore, in order to immediately enhance the penalties for furnishing a deadly weapon to a minor and for furnishing a prohibited weapon, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 55 and 56, § 7: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that a serious shortage of juvenile detention facilities exists and that there is an urgent need to provide for a longer permissible period during which a juvenile may be held in an adult jail; that in order to enable counties to detain larger numbers of juveniles during the time necessary for such counties to construct additional juvenile detention facilities, the Governor needs authority to grant temporary waivers of certain restrictions on the manner of detaining juveniles; that possession of handguns and other unlawful weapons by juveniles is widespread and such possession contributes greatly to the incidence of violent crimes committed by juveniles; that serious measures are needed to remove handguns and other unlawful weapons from the hands of juveniles and to stop such possession; and that the authority of law enforcement officers to take juveniles into custody needs to be clarified. Therefore, in order to extend the time juveniles may be held in an adult jail; to invest the Governor with authority to grant temporary waivers of certain restrictions on the detention of juveniles; to immediately authorize the seizure, forfeiture, and destruction of unlawful weapons possessed by juveniles; to authorize the seizure and forfeiture of any vehicle in which a minor unlawfully possesses a weapon; to require detention of any juvenile who possesses a handgun or machine gun; and to clarify the authority of law enforcement officers to take juveniles into custody, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 57 and 58, § 6: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that many juveniles who have previously been declared delinquent for having committed serious offenses possess handguns and that handgun possession by such juveniles poses a great risk of harm to them and to others. Therefore, in order to immediately increase the penalty for possession of a handgun by juveniles who have previously been found delinquent for having committed certain serious offenses, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), No. 63, § 5: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that many crimes are committed by felons who unlawfully possess firearms and that the penalty for unlawful possession of a firearm by a felon should be increased in order to discourage such unlawful possession. Therefore, in order to immediately increase the penalty for unlawful possession of a firearm by a felon, an emergency is hereby declared to exist and this act being necessary for the immediate preser-

vation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 595, § 5: Mar. 13, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion has arisen with regard to the legality of possession of a firearm by persons who, upon pleading guilty or nolo contendere or being found guilty of a felony in circuit court, have been placed on probation, received a suspended sentence, had their conviction expunged, or are authorized to have their conviction expunged. Further, the opinion of the Arkansas Supreme Court in *Irvin v. State*, 301 Ark. 416, 784 S.W.2d 763 (1990), is at odds with the intent of the General Assembly with regard to the status of those whose felony convictions are subject to being expunged, even though they have not been actually expunged. It is the intent of this Act to legislatively overrule *Irvin v. State*, supra. Therefore, in order to immediately clarify the intent of the General Assembly with regard to the status of those persons who, upon pleading guilty or nolo contendere or being found guilty of felony in circuit court, have been placed on probation, received a suspended sentence, had their conviction expunged, or are authorized to have their conviction expunged, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicles. 2 ALR 4th 1342.

"Bludgeon," "blackjack," or "billy" within meaning of criminal possession statute. 11 ALR 4th 1272.

Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons. 39 ALR 4th 967.

Sufficiency of evidence of possession in prosecution under statute prohibiting persons under indictment for or convicted of crime from acquiring, having, carrying or using firearms or weapons. 43 ALR 4th 788.

Validity of state statute proscribing possession or carrying of knife. 47 ALR 4th 651.

UALR L.J. Oliver, Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns are not Defective Products, 14 UALR L.J. 1.

5-73-101. Definitions.

As used in this chapter:

(1) "Blasting agent" means any material or mixture consisting of fuel and oxidizer intended for blasting if the finished product as mixed for use or shipment cannot be detonated by means of a No. 8 test blasting cap when unconfined;

(2) "Contraband" means any explosive material that was used with the knowledge and consent of the owner to facilitate a violation of this subchapter, as well as any explosive material possessed under circumstances prohibited by law;

(3) "Destructive device" means:

(A) Any of the following:

(i) Any explosive, incendiary, or poison gas;

(ii) Bomb;

(iii) Grenade;

(iv) Rocket having a propellant charge of more than four ounces (4 ozs.);

(v) Missile having an explosive or incendiary charge of more than one-quarter ounce (.25 oz.);

(vi) Mine; or

(vii) Similar device; and

(B) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (3)(A) of this section and from which a destructive device may be readily assembled for use as a weapon;

(4)(A) "Detonator" means any device containing any initiating or primary explosive that is used for initiating detonation.

(B) A detonator may not contain more than ten grams (10 g) of total explosives by weight, excluding ignition or delay charges, and may include, without limitation, electric blasting caps of instantaneous and delay types, blasting caps for use with safety fuses, detonating cord delay connectors, and noninstantaneous and delay blasting caps that use detonating cord, shock tube, or any other replacement for electric leg wires;

(5) "Distribute" means to sell, issue, give, transfer, or otherwise dispose of explosive material;

(6) "Explosive material" means an explosive, blasting agent, or detonator;

(7)(A) "Explosive" means any chemical compound mixture or device, the primary or common purpose of which is to function by explosion.

(B) "Explosive" includes, without limitation:

(i) Dynamite and any other high explosive;

(ii) Black powder;

(iii) Pellet powder;

(iv) An initiating explosive;

(v) A detonator;

(vi) A safety fuse;

- (vii) A squib;
 - (viii) A detonating cord;
 - (ix) An igniter cord;
 - (x) An igniter;
 - (xi) Any material determined to be within the scope of 18 U.S.C. § 841 et seq.; and
 - (xii) Any material classified as an explosive other than consumer fireworks, 1.4 (Class C, Common), by the hazardous materials regulations of the United States Department of Transportation;
- (8) "Instrument of crime" means anything manifestly designed, made, adapted, or commonly used for a criminal purpose;
- (9) "Minor" means any person under eighteen (18) years of age; and
- (10) "Violent felony conviction" means a conviction for any felony offense against the person which is codified in § 5-10-101 et seq., § 5-11-101 et seq., § 5-12-101 et seq., § 5-13-201 et seq., § 5-13-301 et seq., § 5-14-101 et seq., and § 5-14-201 et seq., or any other offense containing as an element of the offense one (1) of the following:
- (A) The use of physical force;
 - (B) The use or threatened use of serious physical force;
 - (C) The infliction of physical harm; or
 - (D) The creation of a substantial risk of serious physical harm.

History. Acts 1975, No. 280, § 3101; A.S.A. 1947, § 41-3101; Acts 2001, No. 1430, § 1; 2005, No. 1226, § 1.

Amendments. The 2001 amendment added present (10).

The 2005 amendment inserted present (1)-(7); and redesignated former (1)-(3) as present (8)-(10).

RESEARCH REFERENCES

Ark. L. Notes. Leflar, Lawyers, Guns and Money: Some Practical Advice about Taking Security Interests in Firearms, 1998 Ark. L. Notes 55.

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-73-102. Possessing instrument of crime.

(a) A person commits the offense of possessing an instrument of crime if he or she possesses any instrument of crime with a purpose to employ it criminally.

(b) Possessing an instrument of crime is a Class A misdemeanor.

History. Acts 1975, No. 280, § 3102; A.S.A. 1947, § 41-3102.

5-73-103. Possession of firearms by certain persons.

(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his or her designee, or the Bureau of Alcohol, Tobacco, Firearms and Explosives of the United States Department of Justice, or

other bureau or office designated by the United States Department of Justice, no person shall possess or own any firearm who has been:

- (1) Convicted of a felony;
- (2) Adjudicated mentally ill; or
- (3) Committed involuntarily to any mental institution.

(b)(1) A determination by a jury or a court that a person committed a felony constitutes a conviction for purposes of subsection (a) of this section even though the court suspended imposition of sentence or placed the defendant on probation.

(2) However, the determination by the jury or court that the person committed a felony does not constitute a conviction for purposes of subsection (a) of this section if the person is subsequently granted a pardon explicitly restoring the ability to possess a firearm.

(c)(1) A person who violates this section commits a Class B felony if:

- (A) The person has a prior violent felony conviction;
- (B) The person's current possession of a firearm involves the commission of another crime; or
- (C) The person has been previously convicted under this section or a similar provision from another jurisdiction.

(2) A person who violates this section commits a Class D felony if he or she has been previously convicted of a felony and his or her present conduct or the prior felony conviction does not fall within subdivision (c)(1) of this section.

(3) Otherwise, the person commits a Class A misdemeanor.

(d) The Governor may restore without granting a pardon the right of a convicted felon or an adjudicated delinquent to own and possess a firearm upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony or delinquency adjudication:

- (1) Did not involve the use of a weapon; and
- (2) Occurred more than eight (8) years ago.

History. Acts 1975, No. 280, § 3103; 1977, No. 360, § 18; A.S.A. 1947, § 41-3103; Acts 1987, No. 74, § 1; 1994 (2nd Ex. Sess.), No. 63, § 1; 1995, No. 595, § 1; 1995, No. 1325, § 1; 2001, No. 1429, § 1.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 1995, No. 1325. This section was also amended by Acts 1995, No. 595, to read as follows:

"(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his designee, or the Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department, or other bureau or office designated by the Treasury Department, no person shall possess or own any firearm who has been:

- "(1) Convicted of a felony; or

"(2) Adjudicated mentally ill; or

"(3) Committed involuntarily to any mental institution.

"(b) A determination by a jury or a court that a person committed a felony:

"(1) Shall constitute a conviction for purposes of subsection (a) of this section even though the court suspended imposition of sentence or placed the defendant on probation; but

"(2) Shall not constitute a conviction for purposes of subsection (a) of this section if the person is subsequently granted a pardon explicitly restoring the ability to possess a firearm.

"(c)(1) A person who violates this section commits a Class B felony if he has been convicted of a felony.

"(2) Otherwise, he commits a Class A misdemeanor.

"(d) The Governor shall have authority to restore the right of a convicted felon to own and possess a firearm:

"(1) By granting a pardon explicitly restoring the right of the person to possess a firearm; or

"(2) Without granting a pardon, upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony did not involve the use of a weapon and occurred more than three (3) years ago."

Publisher's Notes. Acts 1995, No. 1325, became law without the Governor's signature.

Amendments. The 2001 amendment deleted "he has been convicted of a felony, unless the prior felony was for a nonviolent offense and the possession of the firearm did not involve the commission of another crime; then it is a Class D Felony" following "if" in (c)(1); added (c)(1)(A)-(C); inserted present (c)(2); redesignated former (c)(2) as present (c)(3); and inserted "or she" following "he" in (c)(3).

RESEARCH REFERENCES

UALR L.J. DeSimone, Survey of Criminal Law, 3 UALR L.J. 191.

Survey of Arkansas Law, Evidence, 5 UALR L.J. 139.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

ANALYSIS

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Constitutionality.

This section is not an unconstitutional statute based on status since it does not punish the status of being a felon but rather punishes the act of carrying a firearm by one who has been convicted of a felony. *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981).

The legislature could constitutionally provide that any person who had previously been convicted of a felony as defined by this section could not thereafter possess or own a firearm, and this section did not operate as an ex-post facto law when applied to a felon convicted prior to passage of the section. *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

Purpose.

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated as irresponsible or dangerous. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Arrest.

Regardless of whether the information or warrant were defective, a warrant was not required for the defendant's arrest on charges of being a felon in possession of a firearm, a Class D felony under this section, since ARCrP 4.1 provides that a law enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that that person has committed a felony. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Authorization.

The "authorization" clause in subsection (a), permitting a felon to possess a firearm if authorized by the Governor, his designee, or the Treasury Department, creates a defense, as defined by § 5-1-111(c)(3), rather than an element to be proved by the state. *Fendley v. State*, 314 Ark. 435, 863 S.W.2d 284 (1993).

Constructive Possession.

Where defendant occupied the truck with the driver, and the shotgun was located in plain view between the seats, which made it immediately accessible to

her and subject to her control, this was sufficient to constitute constructive possession. *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994).

When possession of contraband is an element of an offense, the State need not prove literal, physical possession; constructive possession can be implied when the contraband is in the joint control of the accused and another person. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Joint occupancy of the vehicle, standing alone, is not sufficient to establish possession of contraband; there must be some other factor linking the accused to the contraband. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Among the "linking" factors this court has considered in cases involving vehicles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with accused's personal effects; (3) whether the contraband is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; (5) whether the accused acted suspiciously before or during the arrest. Courts have also considered the improbability that anyone other than the occupants of the vehicle placed the contraband in the vehicle; and the improbable nature of the accused's explanation for his journey. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

When there is joint occupancy of a residence, additional factors must be proven linking the accused to the firearm. *Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998).

Where police found a .40-caliber firearm sticking out from under the seat of a car where defendant was sitting, substantial evidence supported his conviction for being a felon in possession of a firearm; defendant's constructive possession over the firearm was implied because the firearm was in the joint control of defendant and the driver. *Aaron v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 254 (Mar. 16, 2005).

Conviction.

—In General.

A prior Supreme Court ruling on a completely different statute did not justify the

defendant's reliance on alleged "mistake of law" in assuming his suspended sentence did not constitute a "conviction" under this section prohibiting felons from carrying firearms. *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

—Proof.

As a prior felony conviction was an element of the offense, it was certainly not improper for the prosecutor to refer to the previous conviction prior to the introduction of direct proof so long as competent evidence was later presented to support the statement. *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980).

Where the defendant was charged with being a felon in possession of a firearm, the very nature of the crime charged necessarily placed the defendant on notice that the state would be required to prove that he was a felon, and therefore, the trial court did not abuse its discretion when it allowed the state to introduce documents concerning the defendant's prior felony convictions. *Terry v. State*, 9 Ark. App. 38, 652 S.W.2d 634 (1983).

A prior felony conviction was relevant evidence in a prosecution for possession of a firearm by a felon in that it was an element of the crime, and the trial court's decision that the State could elect to introduce evidence of one prior conviction rather than another was not an abuse of discretion; the defendant's contention that he should be permitted to select the prior conviction to be introduced by the State was not tenable. *Clinkscale v. State*, 15 Ark. App. 166, 690 S.W.2d 740 (1985).

Actual physical possession is not necessary for conviction, nor is ownership; the evidence if sufficient if it is shown, by either direct or circumstantial evidence, that the defendant had the right to exercise control over the object. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Where the gun was found in the defendant's bedroom, directly under a window in which the police officers had observed the defendant looking out when they drove up, the officers saw no other person in that room, and one of the officers testified that he saw the defendant fumbling around with something that could have been a gun, there was substantial evidence from which a jury could infer that the defendant had knowledge of the gun's

presence and a right to control it. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Where defendant was charged with being a felon in possession of a firearm, proof of one prior felony conviction would have been sufficient. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Proof of a prior felony is an element of the crime of felon in possession of a firearm and must be proven beyond a reasonable doubt by the state. To require an accused to prove expungement of his record after completion of his sentence under the Youthful Offender Alternative Service Act would be to require an affirmative defense when none is required by the section. *Irvin v. State*, 301 Ark. 416, 784 S.W.2d 763 (1990).

Evidence.

Impeachment of defendant with remarks made by defendant's attorney during opening statement held not abuse of discretion. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

Where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband, unless there are additional factors linking the defendant with the contraband. *Kandur v. State*, 291 Ark. 194, 726 S.W.2d 682 (1987).

Evidence held insufficient to convict. *Kandur v. State*, 291 Ark. 194, 726 S.W.2d 682 (1987).

Evidence held sufficient to uphold conviction. *Holbird v. State*, 301 Ark. 382, 784 S.W.2d 171 (1990).

Evidence sufficient to support conviction. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Evidence held sufficient to support the jury's determination that the appellant was in possession of the controlled substance and a firearm. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

Where gun owned by defendant's girlfriend was found in the girlfriend's house, where defendant also lived, defendant's remark to police that the gun should have been hidden better was a sufficient additional factor to link the defendant to the gun. *Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998).

Evidence was sufficient to show that the defendant was the same person that had a felony conviction from Texas and, there-

fore, was sufficient to support a conviction for being a felon in possession of a firearm. *Leatherwood v. State*, 69 Ark. App. 233, 11 S.W.3d 571 (2000).

Front passenger's conviction for constructive possession of gun was reversed where, although the gun was under his seat, it was more readily available to driver; however, the rear passenger's conviction was upheld because he was in close proximity to the gun that was found under the rear seat and he had behaved suspiciously by giving the police different dates of birth and repeatedly identifying himself as someone else. *Gamble v. State*, 82 Ark. App. 216, 105 S.W.3d 801 (2003).

Where police seized a rifle in defendant's home during the execution of a search warrant, defendant was properly convicted of one count of felon in possession of a firearm. *McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003).

Where appellant was convicted of two hotel robberies, the trial court properly convicted him of aggravated robbery, rape, being a felon in possession of a firearm, and being a habitual offender. The State alleged that appellant had prior felony convictions. *Townsend v. State*, 355 Ark. 248, 134 S.W.3d 545 (2003).

In defendant's trial for aggravated assault on a family member and felon in possession of a firearm, defendant challenged the State's proof only as to actual possession of the gun and, despite the fact that defendant's parents' later recanted their written statements that defendant was the one with the gun, that credibility determination was for the fact finder and the evidence was sufficient to support defendant's conviction. *Nelson v. State*, 84 Ark. App. 373, 141 S.W.3d 900 (2004).

Although defendant admitted at trial that she possessed the two firearms because they were evidence to prove that she did not commit arson in another criminal case in which the charges against her had been dismissed the year before, she argued that she should not be convicted pursuant to § 5-2-604(a) since her possession of the firearms was justifiable; however, there was no proof of extraordinary attendant circumstances in defendant's case requiring emergency measures to avoid any sort of imminent public or private injury, as required under § 5-2-604 and, thus, there was no reason for giving a jury instruction on the choice-of-evils de-

fense. *Whisenant v. State*, 85 Ark. App. 111, 146 S.W.3d 359 (2004).

Evidence was sufficient to sustain a conviction for possession of firearms by certain persons and to corroborate the accomplice's testimony where witnesses testified as to the role defendant played in the robbery and described his clothing and weapon, which were collected at the scene; further, defendant's jacket had blood stains on it and a hole corresponding to the location of a gunshot wound he received, and defendant was found hiding inside a dumpster near the site where his car became stuck in the mud. *Flowers v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 510 (June 22, 2005).

Expungement of Prior Felony.

A count charging the defendant with being a felon in possession of a firearm was properly dismissed since the underlying felony could not be used by the state because that felony had been lawfully sealed and expunged. *State v. Ross*, 344 Ark. 364, 39 S.W.3d 789 (2001).

Defendant could not be convicted of being a felon in possession of a firearm when his only felony conviction had been properly expunged. *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001).

Intent.

In prosecution for the offense of felon in possession of a firearm, whether the defendant believed that it was legal for a felon to possess a firearm after the completion of his parole was irrelevant. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

Lesser Included Offense.

Since the offense of possession of a firearm requires proof that the person possessing the firearm has been convicted of a felony and that fact is not an element in the proof of aggravated robbery, the lesser offense is not included in aggravated robbery. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), cert. denied, 472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985).

Prior Conviction.

The state can use the defendant's prior felony convictions to convict him of felony in possession of a firearm and then use the same prior felony convictions to enhance the penalty for that conviction. The defendant was not convicted of two offenses

which share the same elements, and thus he was not twice put in jeopardy for the same offense. *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

A prior felony offense of aggravated assault was properly used to establish the defendant's previous felony conviction in a later prosecution for felon in possession of a firearm, notwithstanding that, at the time the defendant was placed on probation for aggravated assault, the court stated that he would be eligible for expungement of his conviction upon successful completion of his probationary period and that the defendant completed his sentence without violating any condition of his probation, since, at the time he was placed on probation. *Edwards v. State*, 70 Ark. App. 127, 15 S.W.3d 358 (2000).

Where defendant offered to stipulate to the convicted-felon element of the felon-in-possession-of-a-firearm charge, the state's introduction of the certified copy of defendant's conviction was unfairly prejudicial and should have been excluded; the right of the state to prove its case had to be balanced against the right of a defendant to a trial free from unfair prejudice. *Ferguson v. State*, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 361 (June 9, 2005).

Sentencing.

The nature of the prior felony and the facts surrounding the incident leading to defendant's arrest do reflect on the seriousness of the crime and are relevant in the determination of sentence, and if these factors were not meant to be considered in sentencing, the General Assembly could have provided for imprisonment for a definite term upon conviction of a felon for possession of a firearm rather than allowing the jury to impose any sentence not in excess of five years. *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980).

Trial Proceedings.

Where during closing arguments the prosecuting attorney pled with the jurors to enforce the law and send a message out to other drug-traffickers in the county that that kind of conduct is not going to be tolerated, the defendant objected but did not ask for a mistrial, and the trial court sustained the objection and admonished the jury that arguments of counsel were not evidence and that they should disregard any statements by counsel which

were not supported by the evidence, there was no error. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

The trial judge erred in refusing to sever a firearm/felon count from a murder count for trial; for an offense based in part on a prior conviction is not part of a single scheme or plan with first degree murder, as ARCrP 22.2(a) requires, nor do the two offenses require the same evidence, which would be an alternative reason for upholding the trial judge's decision to deny severance. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Where the trial of a felon/firearm charge with a murder charge was prejudicial error, the circuit court abused its discretion in denying a motion to sever; accordingly, defendant was prejudiced by the joinder and was entitled to a new trial. *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993).

Trial court abused its discretion by allowing the state to introduce the name and nature of defendant's prior felony conviction, over his objection, after defendant offered to stipulate that he was among the class of persons prohibited from possessing a firearm. *Ferguson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 29 (Jan. 12, 2005).

Where defendant was charged with possession of firearms by certain persons and aggravated assault, the trial court abused its discretion in refusing defendant's offer to stipulate to his prior felony conviction and in overruling defendant's Ark. R. Evid. 403 objection to the admission of his prior conviction; thus, defendant's convictions were reversed. *Ferguson v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 157 (Feb. 23, 2005).

Cited: *Shelton v. State*, 271 Ark. 342, 609 S.W.2d 18 (1980); *Terry v. State*, 271 Ark. App. 715, 610 S.W.2d 272 (1981); *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981); *Bradley v. Bureau of Alcohol, Tobacco & Firearms*, 736 F.2d 1238 (8th Cir. 1984); *Henderson v. State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985); *Beasley v. State*, 29 Ark. App. 104, 777 S.W.2d 865 (1989); *Ussery v. State*, 308 Ark. 67, 822 S.W.2d 848 (1992); *State v. Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993); *Kanig v. State*, 321 Ark. 515, 905 S.W.2d 847 (1995); *Polk v. State*, 329 Ark. 174, 947 S.W.2d 758 (1997); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Timmons v. State*, 81 Ark. App. 219, 100 S.W.3d 52 (2003); *Smith v. State*, 85 Ark. App. 475, 157 S.W.3d 566 (2004).

5-73-104. Criminal use of prohibited weapons.

(a) A person commits the offense of criminal use of prohibited weapons if, except as authorized by law, he or she uses, possesses, makes, repairs, sells, or otherwise deals in any:

- (1) Bomb;
- (2) Machine gun;
- (3) Sawed-off shotgun or rifle;
- (4) Firearm specially made or specially adapted for silent discharge;
- (5) Metal knuckles; or
- (6) Other implement for the infliction of serious physical injury or death.

(b) It is a defense to prosecution under this section that:

- (1) The defendant was a law enforcement officer, prison guard, or member of the armed forces acting in the course and scope of his or her duty at the time he or she used or possessed the prohibited weapon; or
- (2) The defendant used, possessed, made, repaired, sold, or otherwise dealt in any article enumerated in subsection (a) of this section under circumstances negating any likelihood that the weapon could be used as a weapon.

(c)(1) Criminal use of prohibited weapons is a Class B felony if the weapon is a bomb, machine gun, or firearm specially made or specially adapted for silent discharge.

(2) Otherwise, criminal use of prohibited weapons is a Class D felony.

History. Acts 1975, No. 280, § 3104; A.S.A. 1947, § 41-3104; Acts 1993, No. 1189, § 7; 2005, No. 1994, § 438.

A.C.R.C. Notes. Acts 1993, No. 1189, § 1, provided: "(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas further finds that the number of school related crimes is increasing.

"(b) It is the intent of the General Assembly of the State of Arkansas to insure the safest possible learning environment for our students, teachers and other school employees."

Amendments. The 2005 amendment inserted "or she" in (a) and (b); deleted "which serves no common lawful purpose" following "injury or death" in (a); inserted "or her" and "or she" in (b); and substituted "as a weapon" for "unlawfully" in (b)(2).

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Evidence.

Grenade.

Proof.

Sawed-off shotgun.

Constitutionality.

This section is not unconstitutionally vague. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990); *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

Construction.

This section does not create a strict liability offense; under § 5-2-203(b), if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

Defendant may be guilty of criminal use of a prohibited weapon under this section but innocent of possession of a defaced firearm under § 5-73-107. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

Evidence.

Evidence held sufficient to support conviction. *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987); *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Evidence held sufficient to support the conviction for criminal use of a prohibited weapon and aggravated assault. *Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995).

Grenade.

Although the information described the device found in defendant's possession as a grenade, the prosecutor argued that the device was a bomb, and the witnesses identified the object variously as a bomb and a grenade, conviction for a violation of this section was upheld where the testimony also clearly established the object fell under the umbrella of "other implement" as that term is used in subsection (a) of this section. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

Proof.

The "Use of Prohibited Weapons" section does not create a strict liability offense. It requires proof of a culpable mental state. *State v. Setzer*, 302 Ark. 593, 791 S.W.2d 365 (1990).

Sawed-off Shotgun.

A shotgun with a barrel shortened by cutting off a portion thereof constitutes a "sawed-off shotgun." *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Cited: *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989).

5-73-105. Legitimate manufacture, repair, and transportation of prohibited weapons.

Section 5-73-104 shall not be construed to prohibit the manufacture, repair, transportation, or sale of the weapons enumerated in § 5-73-104 to or for an authorized representative of:

- (1) The armed forces; or
- (2) Any law enforcement agency.

History. Acts 1975, No. 280, § 3105;
A.S.A. 1947, § 41-3105.

5-73-106. Defacing a firearm.

(a) A person commits the offense of defacing a firearm if he or she knowingly removes, defaces, mars, covers, alters, or destroys the manufacturer's serial number or identification mark of a firearm.

(b) Defacing a firearm is a Class D felony.

History. Acts 1975, No. 280, § 3106;
A.S.A. 1947, § 41-3106.

5-73-107. Possession of a defaced firearm.

(a) A person commits the offense of possession of a defaced firearm if he or she knowingly possesses a firearm with a manufacturer's serial number or other identification mark required by law that has been removed, defaced, marred, altered, or destroyed.

(b) It is a defense to a prosecution under this section that the person reported the possession to the police or other governmental agency prior to arrest or the issuance of an arrest warrant or summons.

(c)(1) Possession of a defaced firearm is a Class D felony.

(2) However, possession of a defaced firearm is a Class A misdemeanor if the manufacturer's serial number or other identification mark required by law is merely covered or obstructed, but still retrievable.

History. Acts 1975, No. 280, § 3107;
A.S.A. 1947, § 41-3107; Acts 1995, No. 1202, § 1.

CASE NOTES**Construction.**

Defendant may be guilty of criminal use of a prohibited weapon under § 5-73-104 but innocent of possession of a defaced

firearm under this section. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

5-73-108. Criminal acts involving explosives.

(a)(1) A person commits the offense of criminal possession of explosive material or a destructive device if the person:

(A) Sells, possesses, manufactures, transfers, or transports explosive material or a destructive device; and

(B) If he or she:

(i) Has the purpose of using that explosive material or destructive device to commit an offense; or

(ii) Knows or should know that another person intends to use that explosive material or destructive device to commit an offense.

(2) Criminal possession of explosive material or a destructive device is a Class B felony.

(b)(1) A person commits the offense of criminal distribution of explosive material if he or she knowingly distributes explosive material to any individual who:

(A) Has pleaded guilty or nolo contendere to or been found guilty of a crime in state or federal court punishable by imprisonment for a term exceeding one (1) year;

(B) Is under indictment or has been formally charged for a crime punishable by imprisonment for a term exceeding one (1) year;

(C) Is a fugitive from justice;

(D) Is an unlawful user of or addicted to any controlled substance;

or

(E) Has been adjudicated mentally incompetent.

(2) Criminal distribution of explosive material is a Class C felony.

(c)(1) A person commits the offense of possession of stolen explosive material when he or she:

(A) Receives, possesses, transports, ships, conceals, stores, barter, sells, disposes of, or pledges or accepts as security for a loan any stolen explosive materials; and

(B) Knows or has reasonable cause to believe that the explosive material was stolen.

(2) Possession of stolen explosive material is a Class C felony.

(d)(1) A person commits the offense of unlawful receipt or possession of an explosive material if the person:

(A) Has pleaded guilty or nolo contendere to or been found guilty of a crime in any state or federal court of a crime punishable by imprisonment for a term exceeding one (1) year;

(B) Is under indictment or has been formally charged for a crime punishable by imprisonment for a term exceeding one (1) year;

(C) Is a fugitive from justice;

(D) Is an unlawful user of or addicted to any controlled substance;

or

(E) Has been adjudicated mentally incompetent.

(2) Unlawful receipt or possession of explosive material is a Class C felony.

(e) It is a Class A misdemeanor for any person to store any explosive material in a manner not in conformity with the Arkansas Fire Prevention Code.

(f) A person who commits theft of any explosive material with the intent to cause harm to a person or property is guilty of a Class B felony.

(g) Any explosive material determined to be contraband is subject to seizure by a law enforcement officer and destroyed in conformity with the Arkansas Fire Prevention Code.

History. Acts 1975, No. 280, § 3108; A.S.A. 1947, § 41-3108; Acts 2005, No. 1226, § 2.

Amendments. The 2005 amendment redesignated former (a), (a)(1), (a)(2) and (b) as present (a)(1), (a)(1)(A), (a)(1)(B) and (a)(2); rewrote present (a)(1); substituted “explosive material or destructive

device” for “substance or device” in present (a)(1)(A) and (a)(1)(B); substituted “explosive material or a destructive device” for “explosives” in (a)(2); and added present (b)-(g).

Cross References. Arson, § 5-38-301. Duties of State Fire Marshal Enforcement Section, § 12-13-105.

CASE NOTES

ANALYSIS

Conviction.

Evidence.

Conviction.

Conviction upheld. *Mock v. State*, 20 Ark. App. 117, 725 S.W.2d 1 (1987).

Evidence.

Evidence sufficient to support conviction. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

5-73-109. Furnishing a deadly weapon to a minor.

(a) A person commits the offense of furnishing a deadly weapon to a minor if her or she sells, barter, leases, gives, rents, or otherwise furnishes a firearm or other deadly weapon to a minor without the consent of a parent, guardian, or other person responsible for general supervision of the minor's welfare.

(b)(1) Furnishing a deadly weapon to a minor is a Class A misdemeanor.

(2) However, furnishing a deadly weapon to a minor is a Class B felony if the deadly weapon is:

- (A) A handgun;
- (B) A sawed-off or short-barrelled shotgun, as defined in § 5-1-102;
- (C) A sawed-off or short-barrelled rifle, as defined in § 5-1-102;
- (D) A firearm that has been specially made or specially adapted for silent discharge;
- (E) A machine gun;
- (F) An explosive or incendiary device, as defined in § 5-71-301;
- (G) Metal knuckles;
- (H) A defaced firearm, as defined in § 5-73-107; or
- (I) Other implement for the infliction of serious physical injury or death that serves no common lawful purpose.

History. Acts 1975, No. 280, § 3109; A.S.A., 1947, § 41-3109; Acts 1994 (2nd Ex. Sess.), No. 45, § 1.

Cross References. Contributing to delinquency of a minor, § 5-27-205.

CASE NOTES

Applicability.

This section applies to adults and minors; a minor is a "person" within the meaning of this section. *Allstate Ins. Co. v. Burrough*, 120 F.3d 834 (8th Cir. 1997).

Cited: *Allstate Ins. Co. v. Burrough*, 914 F. Supp. 308 (W.D. Ark. 1996).

5-73-110. Disarming minors and mentally defective or irresponsible persons — Disposition of property seized.

(a) Subject to constitutional limitation, nothing in this section and §§ 5-73-101 — 5-73-109 shall be construed to prohibit a law enforcement officer from disarming, without arresting, a minor or person who reasonably appears to be mentally defective or otherwise mentally irresponsible, when that person is in possession of a deadly weapon.

(b) Property seized pursuant to subsection (a) of this section may be:

(1) Returned to the parent, guardian, or other person entrusted with care and supervision of the person so disarmed; or

(2) Delivered to the custody of a court having jurisdiction to try criminal offenses, in which case the court shall:

(A) Treat the property as contraband under §§ 5-5-101 and 5-5-102; or

(B) Issue an order requiring that at a certain time the parent, guardian, or person entrusted with the care and supervision of the person disarmed show cause why the seized property should not be so treated.

(c) Notice of the show cause proceedings may be given in the manner provided for service of criminal summons under Rule 6.3 of Arkansas Rules of Criminal Procedure.

History. Acts 1975, No. 280, § 3110; A.S.A. 1947, § 41-3110.

5-73-111 — 5-73-118. [Reserved.]

5-73-119. Handguns — Possession by minor or possession on school property.

(a)(1) No person in this state under eighteen (18) years of age shall possess a handgun.

(2)(A) A violation of subdivision (a)(1) of this section is a Class A misdemeanor.

(B) A violation of subdivision (a)(1) of this section is a Class D felony if the person has previously:

(i) Been adjudicated delinquent for a violation of subdivision (a)(1) of this section;

(ii) Been adjudicated delinquent for any offense that would be a felony if committed by an adult; or

(iii) Plead guilty or nolo contendere to or been found guilty of a felony in circuit court while under eighteen (18) years of age.

(b)(1) No person in this state shall possess a firearm:

(A) Upon the developed property of a public or private school, K-12;

(B) In or upon any school bus; or

(C) At a designated bus stop as identified on the route list published by a school district each year.

(2)(A) A violation of subdivision (b)(1) of this section is a Class D felony.

(B) No sentence imposed for a violation of subdivision (b)(1) of this section shall be suspended or probated or treated as a first offense under § 16-93-301 et seq.

(c)(1) No person in this state shall possess a handgun upon the property of any private institution of higher education or a publicly supported institution of higher education in this state on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the handgun as a weapon against a person.

(2) A violation of subdivision (c)(1) of this section is a Class D felony.

(d) "Handgun" means a firearm capable of firing rimfire ammunition or centerfire ammunition and designed or constructed to be fired with one (1) hand.

(e) It is a defense to prosecution under this section that at the time of the act of possessing a handgun or firearm:

(1) The person is in his or her own dwelling or place of business or on property in which he or she has a possessory or proprietary interest, except upon the property of a public or private institution of higher learning;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is a licensed security guard acting in the course and scope of his or her duties;

(5) The person is hunting game with a handgun or firearm that may be hunted with a handgun or firearm under the rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun or firearm;

(6) The person is a certified law enforcement officer;

(7) The person is on a journey, unless the person is eighteen (18) years of age or less;

(8) The person is participating in a certified hunting safety course sponsored by the commission or a firearm safety course recognized and approved by the commission or by a state or national nonprofit organization qualified and experienced in firearm safety;

(9) The person is participating in a school-approved educational course or sporting activity involving the use of firearms; or

(10) The person is a minor engaged in lawful marksmanship competition or practice or other lawful recreational shooting under the supervision of his or her parent, legal guardian, or other person twenty-one (21) years of age or older standing in loco parentis or is traveling to or from this activity with an unloaded handgun or firearm accompanied by his or her parent, legal guardian, or other person twenty-one (21) years of age or older standing in loco parentis.

History. Acts 1989, No. 649, §§ 1-4; 1993, No. 1166, § 1; 1993, No. 1189, § 4; 1994 (2nd Ex. Sess.), No. 57, § 1; 1994 (2nd Ex. Sess.), No. 58, § 1; 1999, No. 1282, § 1; 2001, No. 592, § 1; 2005, No. 1994, § 476.

A.C.R.C. Notes. Acts 1993, No. 1189, § 1, provided: “(a) The General Assembly of the State of Arkansas finds that the State of Arkansas is experiencing an increase in violent crime committed by school age juveniles and the growth of street gangs made up largely of school age juveniles. The General Assembly of the State of Arkansas further finds that the number of school related crimes is increasing.

“(b) It is the intent of the General Assembly of the State of Arkansas to insure

the safest possible learning environment for our students, teachers and other school employees.”

Amendments. The 2001 amendment substituted “the commission” for “the Arkansas State Game and Fish Commission” in present (e)(8); and inserted “or other person twenty-one (21) years of age or older standing in loco parentis” in present (e)(10).

The 2005 amendment deleted “or” at the end of present (a)(2)(B)(i), (b)(1)(A), and (e)(2) through (e)(8); inserted “except upon the property of a public or private institution of higher learning” in present (e)(1) and made a related change; and substituted “correctional officer” for “prison guard” in present (e)(2) and twice in present (e)(3).

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12 UALR L.J 617.

CASE NOTES

ANALYSIS

Purpose.
Defenses.
Evidence.
Handgun.
Jurisdiction.

Purpose.

The intent behind this section is to insure safety at our public schools. *S.T. v. State*, 318 Ark. 499, 885 S.W.2d 885 (1994); *Cole v. State*, 323 Ark. 136, 913 S.W.2d 779 (1996).

Defenses.

In enacting present subdivision (e)(1), the General Assembly availed the affirmative defense, possessory interest in dwellings, to all persons, including juveniles,

who violated this section. *Lucas v. State*, 319 Ark. 752, 894 S.W.2d 891 (1995).

Evidence.

Evidence failed to link defendant to constructive possession of handgun. *Knight v. State*, 51 Ark. App. 60, 908 S.W.2d 664 (1995).

Handgun.

The definition of handgun in present subsection (d) of this section uses the phrase “capable of firing rimfire ammunition or centerfire ammunition” in its first clause, but does not read, “capable of firing at time of possession,” nor does it merely read “capable of firing” without reference to certain ammunition; the fact that a weapon is inoperable does not pre-

vent it from being a "handgun" as defined by this section. *S.T. v. State*, 318 Ark. 499, 885 S.W.2d 885 (1994).

The General Assembly used the phrase "capable of firing" and "designed or constructed to be fired" synonymously and interchangeably; thus, if the firearm was designed to fire that particular ammunition, it would qualify as a handgun. *S.T. v. State*, 318 Ark. 499, 885 S.W.2d 885 (1994).

Jurisdiction.

Construction of minor in possession of a handgun in violation of present subdivision (a)(1) of this section in tandem with the grant of jurisdiction to juvenile court in § 9-27-306(a)(1) and the definition of

"delinquent juvenile" in § 9-27-303(11) provides the juvenile court with jurisdiction of the handgun charge. *Jones v. State*, 319 Ark. 762, 894 S.W.2d 591 (1995).

The juvenile court had jurisdiction of delinquency adjudication because it was grounded on possession of a handgun by a person under age 18 years; the intent of the General Assembly was to include violations of this section as delinquent acts, and the omission of the language "or who has violated § 5-73-119" in the definition of "delinquent juvenile" in § 9-27-303(11), which was enacted in 1989, was a drafting error which was corrected by 1994 legislation. *Rosario v. State*, 319 Ark. 764, 894 S.W.2d 888 (1995).

5-73-120. Carrying a weapon.

(a) A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the handgun, knife, or club as a weapon against a person.

(b) As used in this section:

(1) "Club" means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious physical injury or death by striking, including a blackjack, billie, and sap;

(2) "Handgun" means any firearm with a barrel length of less than twelve inches (12") that is designed, made, or adapted to be fired with one (1) hand; and

(3)(A) "Knife" means any bladed hand instrument that is capable of inflicting serious physical injury or death by cutting or stabbing.

(B) "Knife" includes a dirk, sword or spear in a cane, razor, ice pick, throwing star, switchblade, and butterfly knife.

(c) It is a defense to a prosecution under this section that at the time of the act of carrying a weapon:

(1) The person is in his or her own dwelling, place of business, or on property in which he or she has a possessory or proprietary interest;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is carrying a weapon when upon a journey, unless the journey is through a commercial airport when presenting at the security checkpoint in the airport or is in the person's checked baggage and is not a lawfully declared weapon;

(5) The person is a licensed security guard acting in the course and scope of his or her duties;

(6) The person is hunting game with a handgun that may be hunted with a handgun under rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun;

(7) The person is a certified law enforcement officer; or

(8) The person is in a motor vehicle and the person has a license to carry a concealed weapon pursuant to § 5-73-301 et seq.

(d)(1) Any person who carries a weapon into an establishment that sells alcoholic beverages is guilty of a misdemeanor and subject to a fine of not more than two thousand five hundred dollars (\$2,500) or imprisonment for not more than one (1) year, or both.

(2) Otherwise, carrying a weapon is a Class A misdemeanor.

History. Acts 1975, No. 696, § 1; 1981, No. 813, § 1; A.S.A. 1947, § 41-3151; Acts 1987, No. 266, § 1; 1987, No. 556, § 1; 1987, No. 734, § 1; 1995, No. 832, § 1; 2003, No. 1267, § 2; 2005, No. 1994, § 293.

Publisher's Notes. Acts 1995, No. 832, became law without the Governor's signature.

Amendments. The 2003 amendment added "unless the journey ... lawfully declared weapon" to the end of (c)(4).

The 2005 amendment, in (a), inserted "or her" twice and "or she"; and substituted "correctional officer" for "prison guard" in (c)(2) and twice in (c)(3).

RESEARCH REFERENCES

ALR. Validity of airport security measures.

Ark. L. Rev. Act 696: Robbing the Hun-

ter, or Hunting the Robber? 29 Ark. L. Rev. 570.

CASE NOTES

ANALYSIS

Constitutionality.

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Use as a weapon.

Constitutionality.

The state may, as a matter of its police power, place appropriate restriction on one's right to bear arms. *Jones v. State*, 314 Ark. 383, 862 S.W.2d 273 (1993), cert. denied, 512 U.S. 1237, 114 S. Ct. 2743, 129 L. Ed. 2d 863 (1994).

The simultaneous possession statute, § 5-74-106, does not unconstitutionally overlap or conflict with this section. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

Construction.

The primary differences between this section and § 5-73-121 are (1) § 5-73-121 contains no specific element of purpose to use the knife as a weapon against another person; (2) § 5-73-121 carries a three-month maximum term in jail as compared to one year for violation of this section; and (3) § 5-73-121 includes a presumption of guilt if the knife's blade is three-and-one-half inches in length. *Garcia v. State*, 333 Ark. 26, 969 S.W.2d 591 (1998).

Purpose.

Former section prohibiting the wearing or carrying of certain weapons was in-

tended to prevent the carrying of a pistol with a view of being armed and ready for offense or defense in case of conflict with a person or wantonly going armed. *Allison v. State*, 161 Ark. 304, 256 S.W. 42 (1923) (decision under prior law).

Assisting Law Enforcement Officers, Etc.

For cases discussing the use of armed services weapons, see *McDonald v. State*, 83 Ark. 26, 102 S.W. 703 (1907); *Blacknall v. State*, 90 Ark. 570, 119 S.W. 1119 (1909); *Henderson v. State*, 91 Ark. 224, 120 S.W. 966 (1909) (preceding decisions under prior law).

Evidence that the defendant was deputized by the town marshal to assist in preventing an expected disturbance which did not occur did not bring his act of carrying a pistol within the exception, as the marshal was not engaged in guarding prisoners. *Allison v. State*, 161 Ark. 304, 256 S.W. 42 (1923) (decision under prior law).

Evidence and Proof.

It was not necessary to prove that the pistol was loaded. *State v. Wardlaw*, 43 Ark. 73 (1884) (decision under prior law).

Evidence held sufficient to support conviction. *Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972) (decision under prior law).

Where defendant possessed a knife bearing a double-edged, nearly five-inch blade which was concealed under his shirt and in the small part of his back, the knife was described as a gang-type weapon, and defendant offered no explanation for having the knife concealed on his person, evidence of violation of subsection (a) of this section held sufficient. *Nesdahl v. State*, 319 Ark. 277, 890 S.W.2d 596 (1995).

Arrest of driver for violation of this section, after being stopped and searched because the car had no license plates, upheld. *United States v. Peyton*, 108 F.3d 876 (8th Cir. 1997).

Evidence was sufficient to support a conviction for carrying a weapon where the defendant, without a permit, had in her vehicle and in her possession a handgun, and she pointed the gun at another person, which was evidence that the purpose of the handgun was for use against a person. *Dillehay v. State*, 74 Ark. App. 100, 46 S.W.3d 545 (2001).

Indictment.

Indictment held sufficient. *State v. Masner*, 150 Ark. 469, 234 S.W. 474 (1921) (decision under prior law).

Lawful Use.

Carrying a pistol to kill hogs was not a violation of former section prohibiting the wearing or carrying of certain weapons. *Cornwell v. State*, 68 Ark. 447, 60 S.W. 28 (1900) (decision under prior law).

Length of Time Carried.

The weapon need not have been carried for any particular length of time. *Henderson v. State*, 91 Ark. 224, 120 S.W. 966 (1909); *Thompson v. City of Little Rock*, 194 Ark. 78, 105 S.W.2d 537 (1937) (preceding decisions under prior law).

Mail Carriers.

A mail carrier was not by reason of his occupation exempted from former section prohibiting the wearing or carrying of certain weapons. *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891) (decision under prior law).

Occupied Vehicle.

Having a pistol in a glove compartment of an automobile was carrying a pistol. *Stephens v. City of Ft. Smith*, 227 Ark. 609, 300 S.W.2d 14 (1957) (decision under prior law).

There was probable cause to search a car's dashboard compartment where the ammunition in the car, the currency in the vents, and the configuration of the dashboard indicated a fair probability that guns, or other contraband or evidence of a crime, would be found in the dashboard compartment; defendant was held to possess the weapon found in the dashboard compartment. *United States v. Sample*, 136 F.3d 562 (8th Cir. 1998).

Own Dwelling, Property, Etc.

The exception in regard to carrying weapons upon one's own premises only protected such as have an estate or interest in the premises. *Kinkead v. State*, 45 Ark. 536 (1885) (decision under prior law).

A tenant in possession of leased premises had such an interest that would have included him in the exception; however, a lodger or renter who used premises in common with others did not have such an interest that would bring him within the exception. *Clark v. State*, 49 Ark. 174,

4 S.W. 658 (1887) (decision under prior law).

A landlord had no right to carry weapons upon premises in possession of a tenant, although the tenant was wrongfully detaining the same after the termination of his lease. *Jones v. State*, 55 Ark. 186, 17 S.W. 719 (1891) (decision under prior law).

A mere license to enter certain premises gave no right to carry weapons there. *Leemons v. State*, 56 Ark. 559, 20 S.W. 404 (1892) (decision under prior law).

Owner of fee in a highway was not entitled to carry weapons thereon. *Moss v. State*, 65 Ark. 368, 45 S.W. 987 (1898) (decision under prior law).

The word "business" in subsection (c)(1) does not include vehicular businesses, such as a taxi cab or other motor vehicles used for commercial purposes. *Boston v. State*, 330 Ark. 99, 952 S.W.2d 671 (1997).

Persons Upon a Journey.

One who was going from home to a definite point distant enough to convey him beyond the circle of his neighbors, and to detain him throughout the day, and not within the routine of his daily business, was upon a journey within the meaning of the former exception. *Davis v. State*, 45 Ark. 359 (1885) (decision under prior law).

The exception to former statute prohibiting the wearing or carrying of certain weapons was designed as a protection against the perils of the highway to which strangers were exposed, and which were not supposed to exist among one's neighbors. *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891) (decision under prior law).

Whether a mail carrier on his daily trip was making a journey within the meaning of the law was a question of fact for a jury. *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891) (decision under prior law).

One who has been on a journey could not, after his return to his accustomed haunts, continue to carry his pistol. *Holland v. State*, 73 Ark. 425, 84 S.W. 468 (1904) (decision under prior law).

A person, upon completing a journey, could not continue to carry a pistol upon stopping an hour or so at the home of his relative. *Ackerson v. State*, 76 Ark. 301, 89 S.W. 550 (1905) (decision under prior law).

One returning home from a town some miles distant where he knew only one person was upon a journey. *Ellington v.*

Town of Denning, 99 Ark. 236, 138 S.W. 453 (1911) (decision under prior law).

Whether or not the accused was on a journey was a question for the jury. *Collins v. State*, 183 Ark. 425, 36 S.W.2d 75 (1931) (decision under prior law).

Where defendant was merely going from North Little Rock to Little Rock, the defendant, who was charged with carrying a gun illegally, was not entitled to the defense of carrying a weapon when upon a journey. *Woodall v. State*, 260 Ark. 786, 543 S.W.2d 957 (1976) (decision under prior law).

Where there was no evidence in the record which indicated that by driving to a certain city and back, defendant had traveled beyond the circle of his neighbors and general acquaintances, making it necessary to defend against the perils of the highway, the court's failure to give an instruction that being on a "journey" was a defense to the charge of carrying a prohibited weapon did not constitute reversible error. *Riggins v. State*, 17 Ark. App. 68, 703 S.W.2d 463 (1986).

Use as a Weapon.

To sustain a conviction it was essential to show that the pistol was carried as a weapon and whether it was so carried was a question for the jury. *Wylie v. State*, 131 Ark. 572, 199 S.W. 905 (1917) (decision under prior law).

Where pistol was loaded it could be presumed that it was placed in the glove compartment of automobile as a weapon. *Stephens v. City of Ft. Smith*, 227 Ark. 609, 300 S.W.2d 14 (1957) (decision under prior law).

There was a presumption of fact that the loaded pistol found by sheriff's officers under the front seat of the car driven by appellant was placed there as a weapon, and while that presumption may have been removed by proof offered by appellant, it was a question of fact for the jury to resolve the truth and determine whether the pistol was carried as a weapon. *Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972) (decision under prior law).

There is a presumption that a loaded pistol is placed in a car as a weapon. *McGuire v. State*, 265 Ark. 621, 580 S.W.2d 198 (1979).

Cited: *Duckins v. State*, 271 Ark. 658, 609 S.W.2d 674 (Ct. App. 1980); *Hutcher-*

son v. State, 34 Ark. App. 113, 806 S.W.2d 29 (1991); Arkansas Game & Fish Comm'n v. Murders, 327 Ark. 426, 938 S.W.2d 854 (1997).

5-73-121. Carrying a knife as a weapon.

(a) A person who carries a knife as a weapon, except when upon a journey or upon his or her own premises, shall be punished as provided by § 5-73-123(b) [repealed].

(b) If a person carries a knife with a blade three and one-half inches (3½") long or longer, this fact is prima facie proof that the knife is carried as a weapon.

(c) This section does not apply to:

(1) An officer whose duties include making an arrest or keeping and guarding a prisoner; or

(2) A person summoned by the officer to aid in the discharge of the officer's duties while actually engaged in the discharge of the officer's duties.

History. Acts 1961, No. 457, §§ 1-3; A.S.A. 1947, §§ 41-3171 — 41-3173.

A.C.R.C. Notes. Subsection (b) of § 5-73-123 referred to in subsection (a) of this section was repealed by Acts 2005, No. 1994, § 547. The provisions of § 5-73-123(b) provided: "Any person convicted of a violation of any of the provisions of this

section shall be punishable by a fine of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200) or by imprisonment in the county jail for not less than thirty (30) days nor more than three (3) months, or by both fine and imprisonment."

RESEARCH REFERENCES

Ark. L. Rev. Legislation — No. 457 — Person Carrying Knife with Blade 3½ Inches or Longer Presumed to Be Carrying It as a Weapon, 15 Ark. L. Rev. 441.

CASE NOTES

ANALYSIS

Construction.
Evidence.

Construction.

The primary differences between § 5-73-120 and this section are (1) this section contains no specific element of purpose to use the knife as a weapon against another person; (2) this section carries a three-month maximum term in jail as compared to one year for violation of § 5-73-120; and (3) this section includes a presumption of guilt if the knife's blade is three-and-one-

half inches in length. *Garcia v. State*, 333 Ark. 26, 969 S.W.2d 591 (1998).

Evidence.

Defendant violated this section where it was shown that he possessed a knife with a three-and-one-half inch blade at his junior high school during school hours. *Garcia v. State*, 333 Ark. 26, 969 S.W.2d 591 (1998).

Cited: *Smith v. State*, 241 Ark. 958, 411 S.W.2d 510 (1967); *Rowland v. State*, 255 Ark. 215, 499 S.W.2d 623 (1973); *Nesdahl v. State*, 319 Ark. 277, 890 S.W.2d 596 (1995).

5-73-122. Carrying a firearm in publicly owned buildings or facilities.

(a)(1) It is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the

state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a loaded firearm or other deadly weapon in any publicly owned building or facility or on the State Capitol grounds.

(2) It is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a firearm, whether loaded or unloaded, in the State Capitol Building or the Justice Building in Little Rock.

(3) However, the provisions of this subsection do not apply to a person carrying or possessing a firearm or other deadly weapon in a publicly owned building or facility or on the State Capitol grounds for the purpose of participating in a shooting match or target practice under the auspices of the agency responsible for the building or facility or grounds or if necessary to participate in a trade show, exhibit, or educational course conducted in the building or facility or on the grounds.

(4) As used in this section, “facility” means a municipally owned or maintained park, football field, baseball field, soccer field, or another similar municipally owned or maintained recreational structure or property.

(b)(1) Any person other than a law enforcement officer, officer of the court, or bailiff, acting in the line of duty, or any other person authorized by the court, who possesses a handgun in the courtroom of any court of this state is guilty of a Class D felony.

(2) Otherwise, any person violating a provision of this section is guilty of a Class A misdemeanor.

History. Acts 1977, No. 549, §§ 1, 2; 1991, No. 1044, § 1; 1995, No. 1223, § 1; A.S.A. 1947, §§ 41-3113, 41-3114; Acts 1997, No. 910, § 1.

5-73-123. [Repealed.]

Publisher’s Notes. This section, concerning disposition of metal knuckles or canes containing weapons, was repealed by Acts 2005, No. 1994, § 547. The section was derived from Acts 1881, No. 96, §§ 3-7, p. 191; 1907, No. 132, § 1, p. 323; C. & M. Dig., §§ 2805-2809; Pope’s Dig., §§ 3509-3513; Acts 1953, No. 43, § 1; 1973, No. 54, § 2; A.S.A. 1947, §§ 41-3152 — 41-3156.

5-73-124. Tear gas — Pepper spray.

(a)(1) Except as otherwise provided in this section, any person who carries or has in his or her possession any tear gas or pepper spray in any form, and any person who carries or has in his or her possession any gun, bomb, grenade, cartridge, or other weapon designed for the discharge of tear gas or pepper spray, is guilty of a misdemeanor.

(2)(A) It is lawful for a person to possess or carry, and use, a small container of tear gas or pepper spray to be used for self-defense purposes only.

(B) However, the capacity of the cartridge or container shall not exceed one hundred fifty cubic centimeters (150 cc).

(b) The provisions of this section do not apply to any:

(1) Peace officer while engaged in the discharge of his or her official duties; or

(2) Banking institution desiring to have possession of tear gas or pepper spray in any form for the purpose of securing funds in its custody from theft or robbery.

(c)(1) Any person convicted of a violation of a provision of this section shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200) or by imprisonment in the county jail for not less than thirty (30) days nor more than three (3) months, or by both fine and imprisonment.

(2) Any person who uses tear gas or pepper spray in any form against any law enforcement officer who is on duty and is acting within the scope of his or her authority as a law enforcement officer is guilty of a Class A misdemeanor.

History. Acts 1949, No. 338, §§ 1-3; 3168 — 41-3170; Acts 1993, No. 674, § 1; 1977, No. 329, §§ 1, 2; A.S.A. 1947, §§ 41- 1995, No. 1201, § 1.

5-73-125. Interstate sale and purchase of shotguns, rifles, and ammunition.

(a) The sale of shotguns and rifles and ammunition in this state to residents of adjacent states is authorized pursuant to regulations issued by the Secretary of the Treasury under the Federal Gun Control Act of 1968, 18 U.S.C. § 921 et seq., as the act is in effect on March 4, 1969.

(b) A resident of this state is permitted to purchase a rifle, shotgun, or ammunition in an adjacent state as expressly authorized pursuant to the regulations issued under the Federal Gun Control Act of 1968, 18 U.S.C. § 921 et seq., as the act is in effect on March 4, 1969.

History. Acts 1969, No. 159, §§ 1, 2; A.S.A. 1947, §§ 41-3174, 41-3175.

A.C.R.C. Notes. Pursuant to the Homeland Security Act of 2002, Pub. L. 107-296, § 1112(f)(6), the authority to pro-

mulgate regulations under the Federal Gun Control Act of 1968, 18 U.S.C. § 921 et seq., was transferred from the Secretary of the Treasury to the Attorney General of the United States.

5-73-126. Booby traps.

(a) It is unlawful for any person to install or maintain a booby trap upon his or her own property or any other person's property.

(b) As used in this section, "booby trap" means a device designed to cause death or serious physical injury to a person.

(c) Any person who pleads guilty or nolo contendere or who is found guilty of violating this section is guilty of a Class D felony.

History. Acts 1985, No. 243, §§ 1, 2; 1985, No. 399, §§ 1, 2; A.S.A. 1947, §§ 41-1660, 41-1661.

Cross References. Owner's duty to keep premises safe, §§ 18-11-304, 18-11-305, 18-11-307.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

5-73-127. Possession of loaded center-fire weapons in certain areas.

(a) It is unlawful to possess a loaded center-fire weapon, other than a shotgun, and other than in a residence or business of the owner, in the following areas:

(1) Baxter County:

(A) That part bounded on the south by Highway 178, on the west and north by Bull Shoals Lake, and on the east by the Central Electric Power Corporation transmission line from Howard Creek to Highway 178;

(B) That part of Bidwell Point lying south of the east-west road which crosses Highway 101 at the Presbyterian Church;

(C) That part of Bidwell Point lying west of Bennett's Bayou and north of the east-west road which crosses Highway 101 at the Presbyterian Church;

(D) That part of Baxter County between:

(i) County Road 139 and Lake Norfolk to the north and west;

(ii) County Road 151 and Lake Norfolk to the north, west, and south in the Diamond Bay area;

(iii) The Bluff Road and Lake Norfolk to the west;

(iv) John Lewis Road (Timber Lake Manor) and Lake Norfolk to the west and south;

(v) The south end of County Road 91 south of its intersection with John Lewis Road and Lake Norfolk to the south and east; and

(vi) County Road 150 from its intersection with County Road 93 south and Lake Norfolk to the south and east but not east of County Road 93;

(2) Benton County:

(A) That part of the Hobbs Estate north of State Highway 12, west of Rambo Road, and south and east of Van Hollow Creek and the Van Hollow Creek arm of Beaver Lake;

(B) All of Bella Vista Village;

(C) That part bounded on the north by Beaver Lake, on the east by Beaver Lake, on the south by the Hobbs State Management Area boundary from the intersection of State Highway 12 eastward along the boundary to its intersection with the Van Hollow Creek arm of Beaver Lake;

(3) Benton and Carroll Counties: That part bounded on the north by Highway 62, on the east by Highway 187 and Henry Hollow Creek, and

the south and west by Beaver Lake and the road from Beaver Dam north to Highway 62;

(4) Conway County: That part lying above the rimrock of Petit Jean Mountain;

(5) Garland County: All of Hot Springs Village and Diamondhead;

(6) Marion County:

(A) That part known as Bull Shoals Peninsula, bounded on the east and north by White River and Lake Bull Shoals, on the west by the Jimmie Creek arm of Lake Bull Shoals, and on the south by the municipal boundaries of the City of Bull Shoals;

(B) That part of Marion County bounded on the north, west, and south by Bull Shoals Lake and on the east by County Roads 355 and 322 from their intersections with State Highway 202 to the points where they respectively dead-end at arms of Bull Shoals Lake;

(C) The Yocum Bend Peninsula of Bull Shoals Lake bounded on the north and east by Bull Shoals Lake, on the west by Pine Mountain and Bull Shoals Lake, and on the south by County Road 30; and

(D) Those lands situated in Marion County known as the Frost Point Peninsula, not inundated by the waters of Bull Shoals Lake, being more particularly described as follows:

(i) Section Six, Township Twenty North, Range Fifteen West, (Sec. 6 — T.20 N. — R.15 W.), lying south of the White River channel;

(ii) Section One, Township Twenty North, Range Sixteen West, (Sec. 1 — T.20 N. — R.16 W.); and

(iii) East Half of Section Two, Township Twenty North, Range Sixteen West, (E ½ Sec. 2 — T.20 N. — R.16 W.); North Half of the Northeast Quarter of Section Eleven, Township Twenty North, Range Sixteen West (N ½ — NE ¼ Sec. 11 — T.20 N. — R.16 W.); and

(7) A platted subdivision located in an unincorporated area.

(b) Nothing contained in this section shall be construed to limit or restrict or to make unlawful the discharge of a firearm in defense of a person or property within the areas described in this section.

(c) Any person who is found guilty or who pleads guilty or nolo contendere to violating this section shall be fined no less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500).

(d) This section does not apply to a:

(1) Law enforcement officer in the performance of his or her duties; or

(2) Discharge of a center-fire weapon at a firing range maintained for the discharging of a center-fire weapon.

History. Acts 1985, No. 515, §§ 1-3; 1987, No. 829, § 1; 1989, No. 63, § 1; 1991, No. 148, § 1; 1991, No. 731, § 1; 1993, No. 1099, § 1.

A.C.R.C. Notes. Though the amendment by Acts 1987, No. 829, to Acts 1985,

No. 515, omitted subsections (b)-(d) of this section, it does not appear that the General Assembly intended to repeal those subsections by the enactment of Acts 1987, No. 829.

5-73-128. Offenses upon property of public schools.

(a)(1) The court shall prepare and transmit to the Department of Finance and Administration an order of denial of driving privileges for a person within twenty-four (24) hours after the plea or finding, if a person who is less than nineteen (19) years of age at the time of the commission of the offense:

(A) Pleads guilty or nolo contendere to any criminal offense under §§ 5-73-101 et seq. or 5-73-201 et seq., and the plea is accepted by the court, or is found guilty of any criminal offense under §§ 5-73-101 et seq. or 5-73-201 et seq., if the state proves that the offense was committed upon the property of a public school or in or upon any school bus; or

(B) Is found by a juvenile division of circuit court to have committed an offense described in subdivision (a)(1)(A) of this section.

(2) In a case of extreme and unusual hardship, the order may provide for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school.

(b) Upon receipt of an order of denial of driving privileges under this section, the department shall suspend the motor vehicle operator's license of the person for not less than twelve (12) months nor more than thirty-six (36) months.

(c) A penalty prescribed in this section is in addition to any other penalty prescribed by law for an offense covered by this section.

History. Acts 1993, No. 264 §§ 1-3; 1993, No. 781, §§ 1-3.

chapter" in §§ 5-73-101 — 5-73-127 and subchapter 2 may not apply to this section, which was enacted subsequently.

A.C.R.C. Notes. References to "this

5-73-129. Furnishing a handgun or a prohibited weapon to a felon.

(a) A person commits the offense of furnishing a handgun to a felon if he or she sells, barter, leases, gives, rents, or otherwise furnishes a handgun to a person who he or she knows has been found guilty of or pleaded guilty or nolo contendere to a felony.

(b) A person commits the offense of furnishing a prohibited weapon to a felon if he or she sells, barter, leases, gives, rents, or otherwise furnishes:

(1) A sawed-off shotgun or rifle;

(2) A firearm that has been specially made or specially adapted for silent discharge;

(3) A machine gun;

(4) A bomb;

(5) Metal knuckles;

(6) A defaced firearm, as defined in § 5-73-107; or

(7) Other implement for the infliction of serious physical injury or death that serves no common lawful purpose, to a person who has been found guilty of or who has pleaded guilty or nolo contendere to a felony.

(c) Furnishing a handgun or a prohibited weapon to a felon is a Class B felony.

History. Acts 1994 (2nd Ex. Sess.), No. 41, § 1; 1994 (2nd Ex. Sess.), No. 42, § 1.

5-73-130. Seizure and forfeiture of firearm — Seizure and forfeiture of motor vehicle — Disposition of property seized.

(a) If a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or a conviction, is subject to forfeiture.

(b) If a felon or a person under eighteen (18) years of age is unlawfully in possession of a firearm in a motor vehicle, the motor vehicle is subject to seizure and, after an adjudication of delinquency or a conviction, subject to forfeiture.

(c) As used in this section, “unlawfully in possession of a firearm” does not include any act of possession of a firearm that is prohibited only by:

(1) Section 15-43-214 [repealed], unlawful to possess firearms while hunting deer or turkey by bow and arrow;

(2) Section 15-43-225 [repealed], unlawful for guide for persons hunting migratory birds to carry gun;

(3) Section 5-43-317 [repealed], unlawful to shoot fish with a gun;

(4) Section 5-73-127, unlawful to possess loaded center-fire weapons in certain areas; or

(5) A regulation of the Arkansas State Game and Fish Commission.

(d) The procedures for forfeiture and disposition of the seized property is as follows:

(1) The prosecuting attorney of the judicial district within whose jurisdiction the property is seized that is sought to be forfeited shall promptly proceed against the property by filing in the circuit court a petition for an order to show cause why the circuit court should not order forfeiture of the property; and

(2) The petition shall be verified and shall set forth:

(A) A statement that the action is brought pursuant to this section;

(B) The law enforcement agency bringing the action;

(C) A description of the property sought to be forfeited;

(D) A statement that on or about a date certain there was an adjudication of delinquency or a conviction and a finding that the property seized is subject to forfeiture;

(E) A statement detailing the facts in support of subdivision (d)(1) of this section; and

(F) A list of all persons known to the law enforcement agency, after diligent search and inquiry, who may claim an ownership interest in the property by title or registration or by virtue of a lien allegedly perfected in the manner prescribed by law.

(e)(1) Upon receipt of a petition complying with the requirements of subdivision (d)(1) of this section, the circuit court judge having juris-

diction shall issue an order to show cause setting forth a statement that this subchapter is the controlling law.

(2) In addition, the order shall set a date at least forty-one (41) days from the date of first publication of the order pursuant to subsection (f) of this section for all persons claiming an interest in the property to file such pleadings as they desire as to why the circuit court should not order the forfeiture of the property for use, sale, or other disposition by the law enforcement agency seeking forfeiture of the property.

(3) The circuit court shall further order that any person who does not appear on that date is deemed to have defaulted and waived any claim to the subject property.

(f)(1) The prosecuting attorney shall give notice of the forfeiture proceedings by:

(A) Causing a copy of the order to show cause to be published two (2) times each week for two (2) consecutive weeks in a newspaper having general circulation in the county where the property is located with the last publication being not less than five (5) days before the show cause hearing; and

(B) Sending a copy of the petition and order to show cause by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(i) The property is of a type for which title or registration is required by law;

(ii) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(iii) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The law enforcement agency is only obligated to make diligent search and inquiry as to the owner of the property, and if, after diligent search and inquiry, the law enforcement agency is unable to ascertain the owner, the requirement of actual notice by mail with respect to a person having a perfected security interest in the property is not applicable.

(g) At the hearing on the matter, the petitioner has the burden to establish that the property is subject to forfeiture by a preponderance of the evidence.

(h) In determining whether or not a motor vehicle should be ordered forfeited, the circuit court may take into consideration the following factors:

(1) Any prior criminal conviction or delinquency adjudication of the felon or juvenile;

(2) Whether or not the firearm was used in connection with any other criminal act;

(3) Whether or not the vehicle was used in connection with any other criminal act;

(4) Whether or not the juvenile or felon was the lawful owner of the vehicle in question;

(5) If the juvenile or felon is not the lawful owner of the vehicle in question, whether or not the lawful owner knew of the unlawful act being committed that gives rise to the forfeiture penalty; and

(6) Any other factor the circuit court deems relevant.

(i) The final order of forfeiture by the circuit court shall perfect in the law enforcement agency right, title, and interest in and to the property and shall relate back to the date of the seizure.

(j) Physical seizure of property is not necessary in order to allege in a petition under this section that the property is forfeitable.

(k) Upon filing the petition, the prosecuting attorney for the judicial district may also seek such protective orders as are necessary to prevent the transfer, encumbrance, or other disposal of any property named in the petition.

(l) The law enforcement agency to which the property is forfeited shall:

(1) Destroy any forfeited firearm; and

(2) Either:

(A) Sell the motor vehicle in accordance with subsection (m) of this section; or

(B) If the motor vehicle is not subject to a lien that has been preserved by the circuit court, retain the motor vehicle for official use.

(m)(1) If a law enforcement agency desires to sell a forfeited motor vehicle, the law enforcement agency shall first cause notice of the sale to be made by publication at least two (2) times a week for two (2) consecutive weeks in a newspaper having general circulation in the county and by sending a copy of the notice of the sale by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(A) The property is of a type for which title or registration is required by law;

(B) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(C) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The notice of the sale shall include the time, place, and conditions of the sale and a description of the property to be sold.

(3) The property shall then be disposed of at public auction to the highest bidder for cash without appraisal.

(n) The proceeds of any sale and any moneys forfeited shall be applied to the payment of:

(1) The balance due on any lien preserved by the circuit court in the forfeiture proceedings;

(2) The cost incurred by the seizing law enforcement agency in connection with the storage, maintenance, security, and forfeiture of the property;

(3) The costs incurred by the prosecuting attorney or attorney for the law enforcement agency, approved by the prosecuting attorney, to which the property is forfeited; and

(4) Costs incurred by the circuit court.

(o) The remaining proceeds or moneys shall be deposited into a special county fund to be titled the “Juvenile Crime Prevention Fund”, and the moneys in the fund shall be used solely for making grants to community-based nonprofit organizations that work with juvenile crime prevention and rehabilitation.

History. Acts 1994 (2nd Ex. Sess.), No. 55, § 1; 1994 (2nd Ex. Sess.), No. 56, § 1; 2005, No. 1994, § 260.

Amendments. The 2005 amendment deleted “or the juvenile division of chancery court” following “circuit court”

throughout this section; deleted “or the juvenile division of chancery court having jurisdiction of such person” following “circuit court” in (d)(1); and substituted “two (2) times” for “twice” in (f)(1)(A) and (m)(1).

5-73-131. Possession or use of weapons by incarcerated persons.

(a) A person commits the offense of possession or use of weapons by incarcerated persons if, without approval of custodial authority he or she uses, possesses, makes, repairs, sells, or otherwise deals in any weapon, including, but not limited to, any bomb, firearm, knife, or other implement for the infliction of serious physical injury or death and that serves no common lawful purpose, while incarcerated in the Department of Correction, the Department of Community Correction, or a county or municipal jail or detention facility.

(b) Possession or use of weapons by incarcerated persons is a Class D felony.

(c) This section is not applicable to possession of a weapon by an incarcerated person before he or she completes the standard booking and search procedures in a jail facility after arrest.

History. Acts 1995, No. 443, § 1; 1995, No. 453, § 1.

5-73-132. Sale, rental, or transfer of firearm to person prohibited from possessing firearms.

(a) A person shall not sell, rent, or transfer a firearm to any person who he or she knows is prohibited by state or federal law from possessing the firearm.

(b)(1) Violation of this section is a Class A misdemeanor, unless the firearm is:

- (A) A handgun;
- (B) A sawed-off or short-barrelled shotgun, as defined in § 5-1-102;
- (C) A sawed-off or short-barrelled rifle, as defined in § 5-1-102;
- (D) A firearm that has been specially made or specially adapted for silent discharge;
- (E) A machine gun;
- (F) An explosive or incendiary device, as defined in § 5-71-301;
- (G) A defaced firearm, as defined in § 5-73-107; or
- (H) Other implement for the infliction of serious physical injury or death that serves no common lawful purpose.

(2) If the firearm is listed in subdivision (b)(1) of this section, a violation of this section is a Class B felony.

History. Acts 1999, No. 1558, § 3.

5-73-133. Possession of a taser stun gun.

(a) As used in this section, “taser stun gun” means any device that:

(1) Is powered by an electrical charging unit such as a battery; and

(2) Either:

(A) Emits an electrical charge in excess of twenty thousand (20,000) volts; or

(B) Is otherwise capable of incapacitating a person by an electrical charge.

(b)(1) No person who is eighteen (18) years of age or under may purchase or possess a taser stun gun.

(2) No person shall sell, barter, lease, give, rent, or otherwise furnish a taser stun gun to a person who is eighteen (18) years of age or under.

(c) Any law enforcement officer using a taser stun gun shall be properly trained in the use of the taser stun gun and informed of any danger or risk of serious harm and injury that may be caused by the use of the taser stun gun on a person.

(d)(1) A person who violates subdivision (b)(1) of this section is deemed guilty of an unclassified misdemeanor punishable by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000).

(2) A person who violates subdivision (b)(2) of this section is deemed guilty of a Class B felony.

History. Acts 2005, No. 2153, § 1.

SUBCHAPTER 2 — UNIFORM MACHINE GUN ACT

SECTION.

5-73-201. Title.

5-73-202. Definitions.

5-73-203. Uniformity of interpretation.

5-73-204. Possession or use for offensive or aggressive purposes unlawful.

5-73-205. Presumption of offensive or aggressive purpose.

5-73-206. Evidence of possession or use.

SECTION.

5-73-207. Manufacture for military, non-aggressive, or nonoffensive use.

5-73-208. Registration by manufacturers.

5-73-209. [Repealed.]

5-73-210. Search warrants.

5-73-211. Perpetrating or attempting crime.

Effective Dates. Acts 1935, No. 80, § 14: Feb. 26, 1935. Emergency clause provided: “Whereas, under the present law of the state of Arkansas the officers of the state are powerless to effectively combat crime, therefore, it being necessary for

the preservation of the public peace, health and safety, an emergency is hereby declared, and this act shall take effect and be in force from and after its passage and approval.”

RESEARCH REFERENCES

UALR L.J. Oliver, Rejecting the “Whipping-Boy” Approach to Tort Law: Well-Made Handguns are not Defective Products, 14 UALR L.J. 1.

5-73-201. Title.

This subchapter may be cited as the “Uniform Machine Gun Act”.

History. Acts 1935, No. 80, § 12; Pope’s Dig., § 3525; A.S.A. 1947, § 41-3167.

5-73-202. Definitions.

As used in this subchapter:

(1) “Crime of violence” means any of the following crimes or an attempt to commit any of them:

- (A) Murder;
- (B) Manslaughter;
- (C) Kidnapping;
- (D) Rape;
- (E) Mayhem;
- (F) Assault to do great bodily harm;
- (G) Robbery;
- (H) Burglary;
- (I) Housebreaking;
- (J) Breaking and entering; and
- (K) Larceny;

(2) “Machine gun” means a weapon of any description by whatever name known, loaded or unloaded, from which more than five (5) shots or bullets may be rapidly, or automatically, or semi-automatically, discharged from a magazine, by a single function of the firing device; and

(3) “Person” includes a firm, partnership, association, or corporation.

History. Acts 1935, No. 80, § 1; Pope’s Dig., § 3514; A.S.A. 1947, § 41-3157.

CASE NOTES

Machine Gun.

Expert testimony concerning the weapon and why it would not fire more than once established a fact question for

the jury concerning whether the seized weapon was a machine gun. Beck v. State, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

5-73-203. Uniformity of interpretation.

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History. Acts 1935, No. 80, § 11; Pope's Dig., § 3524; A.S.A. 1947, § 41-3166.

5-73-204. Possession or use for offensive or aggressive purposes unlawful.

Possession or use of a machine gun for offensive or aggressive purpose is declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than ten (10) years.

History. Acts 1935, No. 80, § 3; Pope's Dig., § 3516; A.S.A. 1947, § 41-3159.

CASE NOTES

Cited: Beck v. State, 12 Ark. App. 341, 676 S.W.2d 740 (1984).

5-73-205. Presumption of offensive or aggressive purpose.

(a) Possession or use of a machine gun is presumed to be for an offensive or aggressive purpose:

(1) When the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found;

(2) When in the possession of or used by an unnaturalized foreign-born person or a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America, its territories or insular possessions;

(3) When the machine gun is of the kind described in § 5-73-209 [repealed] and has not been registered as required in § 5-73-209 [repealed]; or

(4) When empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of use in the machine gun are found in the immediate vicinity of the machine gun.

(b) A machine gun is exempt from the presumption of offensive or aggressive purpose if:

(1) The machine gun has been registered to a corporation in the business of manufacturing ammunition or a representative of the corporation under the National Firearms Act, 26 U.S.C. § 5801 et seq., or the Gun Control Act, 18 U.S.C. § 921 et seq.;

(2) The machine gun is being used primarily to test ammunition in a nonoffensive and nonaggressive manner by the corporation or the corporation's representative that the machine gun is registered to; and

(3) The corporation or the corporation's representative is not prohibited from the possession of a firearm by any state or federal law.

History. Acts 1935, No. 80, § 4; Pope's Dig., § 3517; A.S.A. 1947, § 41-3160; Acts 2003, No. 1352, § 1.

A.C.R.C. Notes. Section 5-73-209, referred to in subdivision (a)(3) of this section, was repealed by Acts 2001, No. 1181,

§ 1. The section concerned the registration of machine guns by users and owners.

Amendments. The 2003 amendment added (b).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Weapons, 26 UALR L.J. 370.

5-73-206. Evidence of possession or use.

The presence of a machine gun in any room, boat, or vehicle is evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the machine gun is found.

History. Acts 1935, No. 80, § 5; Pope's Dig., § 3518; A.S.A. 1947, § 41-3161.

5-73-207. Manufacture for military, nonaggressive, or non-offensive use.

Nothing contained in this subchapter prohibits or interferes with:

(1) The manufacture for and sale of machine guns to the military forces or the peace officers of the United States or of any political subdivision of the United States, or the transportation required for that purpose;

(2) The possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake; or

(3) The possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive.

History. Acts 1935, No. 80, § 6; Pope's Dig., § 3519; A.S.A. 1947, § 41-3162.

5-73-208. Registration by manufacturers.

(a) Every manufacturer shall keep a register of all machine guns manufactured or handled by the manufacturer.

(b) This register shall show:

(1) The model and serial number, date of manufacture, sale, loan, gift, delivery, or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given, or delivered, or from whom it was received; and

(2) The purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given, or delivered, or from whom received.

(c) Upon demand every manufacturer shall permit any marshal, sheriff, or police officer to inspect the manufacturer's entire stock of machine guns, parts, and supplies therefor, and shall produce the register, required by this section, for inspection.

(d) A violation of any provision of this section is punishable by a fine of not less than hundred dollars.

History. Acts 1935, No. 80, § 7; Pope's Dig., § 3520; A.S.A. 1947, § 41-3163.

5-73-209. [Repealed.]

A.C.R.C. Notes. Acts 1989, No. 373, § 1, provided, in part, that anyone possessing a registered machine gun on July 3, 1989, should register it within 90 days of that date and that anyone possessing an unregistered machine gun on July 3, 1989, shall register it within 24 hours after July 3, 1989.

Publisher's Notes. This section, concerning the registration of machine guns by users and owners, was repealed by Acts 2001, No. 1181, § 1. The section was derived from Acts 1935, No. 80, § 8; Pope's Dig., § 3521; A.S.A. 1947, § 41-3164; Acts 1989, No. 373, § 1.

5-73-210. Search warrants.

Warrant to search any house or place and seize any machine gun adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm) or larger caliber possessed in violation of this subchapter may issue in the same manner and under the same restrictions as provided by law for stolen property, and any court of record upon application of the prosecuting attorney shall have jurisdiction and power to order any illegal machine gun, thus legally seized, to be confiscated and either destroyed or delivered to a law enforcement officer of the state or a political subdivision of the state.

History. Acts 1935, No. 80, § 9; Pope's Dig., § 3522; A.S.A. 1947, § 41-3165; Acts 2005, No. 1994, § 247.

Amendments. The 2005 amendment

inserted "illegal," deleted "or otherwise" preceding "legally seized" and substituted "law enforcement officer" for "peace officer."

5-73-211. Perpetrating or attempting crime.

Possession or use of a machine gun in the course of a criminal offense is a Class A felony.

History. Acts 1935, No. 80, § 2; Pope's Dig., § 3515; A.S.A. 1947, § 41-3158; Acts 2005, No. 1994, § 414.

Amendments. The 2005 amendment substituted "course of a criminal offense is a Class A felony" for "perpetration or at-

tempted perpetration of a crime of violence is deemed to be a crime punishable by imprisonment in the State Penitentiary for a term of not less than twenty (20) years."

SUBCHAPTER 3 — CONCEALED HANDGUNS

SECTION.

- 5-73-301. Definitions.
- 5-73-302. Authority to issue license.
- 5-73-303. Immunity from civil damages.
- 5-73-304. Exemptions.
- 5-73-305. Criminal penalty.

SECTION.

- 5-73-306. Prohibited places.
- 5-73-307. List of license holders.
- 5-73-308. License — Issuance or denial.
- 5-73-309. License — Requirements.
- 5-73-310. Application form.

SECTION.

- 5-73-311. Application procedure.
- 5-73-312. Revocation.
- 5-73-313. Expiration and renewal.
- 5-73-314. Lost or destroyed license — Change of address.
- 5-73-315. Possession of license — Identification of licensee.
- 5-73-316. Fees.

SECTION.

- 5-73-317. Rules and regulations.
- 5-73-318. Instructor review of applications.
- 5-73-319. Transfer of a license to Arkansas.
- 5-73-320. License for certain members of the Arkansas National Guard.

A.C.R.C. Notes. References to “this chapter” in subchapters 1 and 2 may not apply to this subchapter which was enacted subsequently.

Publisher’s Notes. Acts 1999, No. 786, § 2, provided: “(a) A license to carry a concealed handgun under Arkansas Code 5-73-308, issued prior to the effective date of this act, shall not be restricted to the handguns for which the person was licensed. If one (1) or more of the handguns for which the person was licensed is a semiautomatic handgun then the person may carry any handgun he or she chooses. If a semiautomatic handgun was not included then the person may carry any handgun other than a semiautomatic handgun.

“(b) As used in this section, ‘handgun’ has the same meaning as provided in Arkansas Code 5-73-301.”

Effective Dates. Acts 1999, No. 51, § 5: Feb. 11, 1999. Emergency clause provided: “It is hereby found and determined by the Eighty-second General Assembly that the Brady Handgun Violence Prevention Act will allow concealed handgun licensees in qualifying states to avoid the instant background checks required by federal law; that these background checks place an unnecessary and costly burden on responsible citizens to wait for the completion of the background check and to pay the cost of the system; and that by modifying the Arkansas law it will eliminate a costly and duplicative background check for these responsible citizens when purchasing firearms in Arkansas. There-

fore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

Acts 1999, No. 1508, § 19: Apr. 15, 1999. Emergency clause provided: “It is hereby found and determined by the Eighty-second General Assembly that this act makes various technical corrections in the Arkansas Code; that this act further clarifies the law to provide that the Arkansas Code Revision Commission may correct errors resulting from enactments of prior sessions; and that this act should go into effect immediately in order to be applicable during the codification process of the enactments of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

5-73-301. Definitions.

As used in this subchapter:

- (1) “Concealed” means to cover from observation so as to prevent public view;

(2) "Director" means the Director of the Department of Arkansas State Police; and

(3) "Handgun" means any firearm, other than a fully automatic firearm, with a barrel length of less than twelve inches (12") that is designed, made, or adapted to be fired with one (1) hand.

History. Acts 1995, No. 411, § 1; 1995, No. 419, § 1; 1997, No. 1239, § 1.

5-73-302. Authority to issue license.

(a) The Director of the Department of Arkansas State Police may issue a license to carry a concealed handgun to a person qualified as provided in this subchapter.

(b) The license to carry a concealed handgun is valid throughout the state for a period of four (4) years from the date of issuance.

(c)(1)(A) A license issued to a former elected or appointed sheriff of any county of this state shall be renewed every four (4) years.

(B) The license issued to a former elected or appointed sheriff is revocable on the same grounds as other licenses.

(2)(A) The former elected or appointed sheriff shall meet the same qualifications as all other applicants.

(B) However, the former elected or appointed sheriff is exempt from the fee prescribed by § 5-73-311(a)(2) and from the training requirements of § 5-73-309(a)(11) for issuance.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 389, § 1.

5-73-303. Immunity from civil damages.

The state, a county or city, or any employee of the state, county, or city is not liable for any civil damages resulting from the issuance of a license pursuant to a provision of this subchapter.

History. Acts 1995, No. 411, § 3; 1995, No. 419, § 3.

5-73-304. Exemptions.

(a)(1) A certified law enforcement officer, chief of police, or sheriff is exempt from the licensing requirements of this subchapter, if otherwise authorized to carry a concealed handgun.

(2) Solely for purposes of this subchapter, an auxiliary law enforcement officer certified by the Arkansas Commission on Law Enforcement Standards and Training and approved by the sheriff of the county is deemed to be a certified law enforcement officer.

(b) An auxiliary law enforcement officer is exempt from the licensing requirements of this subchapter when:

(1) The auxiliary law enforcement officer has completed the minimum training requirements and is certified as an auxiliary law enforcement officer in accordance with the commission; and

(2) Specifically authorized in writing by the auxiliary law enforcement officer's chief of police or sheriff.

(c) The authorization prescribed in (b)(2) of this section shall be carried on the person of the auxiliary law enforcement officer and be produced upon demand at the request of any law enforcement officer or owner or operator of any of the prohibited places as set out in § 5-73-306.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 696, § 1; 1997, No. 1239, § 8; 1999, No. 1508, §§ 1, 7.

5-73-305. Criminal penalty.

Any person who knowingly submits a false answer to any question on an application for a license issued pursuant to this subchapter, or who knowingly submits a false document when applying for a license issued pursuant to this subchapter upon conviction is guilty of a Class B misdemeanor.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2.

5-73-306. Prohibited places.

(a) No license to carry a concealed handgun issued pursuant to this subchapter authorizes any person to carry a concealed handgun into:

(1) Any police station, sheriff's station, or Department of Arkansas State Police station;

(2) Any Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department facility;

(3)(A) Any building of the Arkansas State Highway and Transportation Department or onto grounds adjacent to any building of the Arkansas State Highway and Transportation Department.

(B) However, subdivision (a)(3)(A) of this section does not apply to a rest area or weigh station of the Arkansas State Highway and Transportation Department;

(4) Any detention facility, prison, or jail;

(5) Any courthouse;

(6)(A) Any courtroom.

(B) However, nothing in this subchapter precludes a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom;

(7) Any polling place;

(8) Any meeting place of the governing body of any governmental entity;

(9) Any meeting of the General Assembly or a committee of the General Assembly;

- (10) Any building where a state office is located;
- (11) Any athletic event not related to firearms;
- (12) Any portion of an establishment, except a restaurant as defined in § 3-9-402, licensed to dispense alcoholic beverages for consumption on the premises;
- (13) Any portion of an establishment, except a restaurant as defined in § 3-9-402, where beer or light wine is consumed on the premises;
- (14) Any school, college, community college, or university campus building or event, unless for the purpose of participating in an authorized firearms-related activity;
- (15) Inside the passenger terminal of any airport, except that no person is prohibited from carrying any legal firearm into the passenger terminal if the firearm is encased for shipment for purposes of checking the firearm as baggage to be lawfully transported on any aircraft;
- (16) Any church or other place of worship; or
- (17) Any place where the carrying of a firearm is prohibited by federal law.

(b)(1)(A) In addition to a place enumerated in this section, the carrying of a concealed handgun may be disallowed in any place at the discretion of the person or entity exercising control over the physical location of the place by placing at each entrance to the place a written notice clearly readable at a distance of not less than ten feet (10') that "carrying a handgun is prohibited".

(B)(i) If the place does not have a roadway entrance, there shall be a written notice placed anywhere upon the premises of the place.

(ii) However, there shall be at least one (1) written notice posted within every three (3) acres of a place with no roadway entrance.

(2)(A) However, no sign is required for a private home.

(B) Any licensee entering a private home shall notify the occupant that the licensee is carrying a concealed handgun.

(c) No license issued pursuant to this subchapter authorizes a participant to carry a concealed handgun in a parade or demonstration for which a permit is required.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 2; 2003, No. 1110, § 1.

Amendments. The 2003 amendment deleted (a)(11) and redesignated the remaining subdivisions accordingly; in-

serted "except a restaurant as defined in § 3-9-402" in (a)(12) and (a)(13); redesignated (b)(1) as (b)(1)(A) and added "at each entrance to the location"; added (b)(1)(B); and made a minor stylistic change.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Weapons, 26 UALR L.J. 370.

5-73-307. List of license holders.

(a) The Department of Arkansas State Police shall maintain an automated listing of license holders and this information shall be

available on-line, upon request, at any time, to any law enforcement agency through the Arkansas Crime Information Center.

(b) Nothing in this subchapter shall be construed to require or allow the registration, documentation, or providing of a serial number with regard to any firearm, except as required by former § 5-73-310(8).

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 3.

A.C.R.C. Notes. The reference in subsection (b) of this section to § 5-73-310(8) is a reference to the version of that subdi-

vision prior to its amendment by Acts 1999, No. 786, § 1. Acts 1999, No. 786, § 1 repealed the provisions of § 5-73-310(8) regarding the serial number of a handgun.

5-73-308. License — Issuance or denial.

(a)(1)(A) The Director of the Department of Arkansas State Police may deny a license if within the preceding five (5) years the applicant has been found guilty of one (1) or more crimes of violence constituting a misdemeanor or for the offense of carrying a weapon.

(B) The director may revoke a license if the licensee has been found guilty of one (1) or more crimes of violence within the preceding three (3) years.

(2) Subdivision (a)(1) of this section does not apply to a misdemeanor that has been expunged or for which the imposition of sentence was suspended.

(3) Upon notification by any law enforcement agency or a court and subsequent written verification, the director shall suspend a license or the processing of an application for a license if the licensee or applicant is arrested or formally charged with a crime that would disqualify the licensee or applicant from having a license under this subchapter until final disposition of the case.

(b)(1) The director may deny a license if the sheriff or chief of police, if applicable, of the applicant's place of residence submits an affidavit that the applicant has been or is reasonably likely to be a danger to himself or herself or others or to the community at large as the result of the applicant's mental or psychological state, as demonstrated by past patterns of behavior or participation in an incident involving unlawful violence or threats of unlawful violence, or if the applicant is under a criminal investigation at the time of applying for a license.

(2) Within one hundred twenty (120) days after the date of receipt of the items listed in § 5-73-311(a), the director shall:

(A) Issue the license; or

(B) Deny the application based solely on the ground that the applicant fails to qualify under the criteria listed in this subchapter.

(3)(A) If the director denies the application, the director shall notify the applicant in writing, stating the grounds for denial.

(B) The decision of the director is final.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 4.

Publisher's Notes. Acts 1999, No. 786,

§ 2, provided: "(a) A license to carry a concealed handgun under Arkansas Code 5-73-308, issued prior to the effective date

of this act, shall not be restricted to the handguns for which the person was licensed. If one (1) or more of the handguns for which the person was licensed is a semiautomatic handgun then the person may carry any handgun he or she chooses. If a semiautomatic handgun was not in-

cluded then the person may carry any handgun other than a semiautomatic handgun.

“(b) As used in this section, ‘handgun’ has the same meaning as provided in Arkansas Code 5-73-301.”

5-73-309. License — Requirements.

(a) The Director of the Department of Arkansas State Police shall issue a license to carry a concealed handgun if the applicant:

(1)(A) Is both a:

(i) Citizen of the United States; and

(ii) Resident of the state and has been a resident continuously for twelve (12) months or longer immediately preceding the filing of the application.

(B) However, subdivision (a)(1)(A) does not apply to any:

(i) Retired city, county, state, or federal law enforcement officer; or

(ii) Active duty military personnel who submit documentation of their active duty status;

(2) Is twenty-one (21) years of age or older;

(3) Does not suffer from a mental or physical infirmity that prevents the safe handling of a handgun and has not threatened or attempted suicide;

(4) Is not:

(A) Ineligible to possess a firearm by virtue of having been convicted of a felony in a court of this state, of any other state, or of the United States without having been pardoned for conviction and had firearms possession rights restored; and

(B) Subject to any federal, state, or local law that makes it unlawful to receive, possess, or transport any firearm, and has had his or her background checked through the Federal Bureau of Investigation's National Instant Criminal Background Check System;

(5)(A) Does not chronically or habitually abuse a controlled substance to the extent that his or her normal faculties are impaired.

(B) It is presumed that an applicant chronically and habitually uses a controlled substance to the extent that his or her faculties are impaired if the applicant has been:

(i) Voluntarily or involuntarily committed to a treatment facility for the abuse of a controlled substance; or

(ii) Found guilty of a crime under the provisions of the Uniform Controlled Substances Act, § 5-64-101 et seq., or a similar law of any other state or the United States relating to a controlled substance within the three-year period immediately preceding the date on which the application is submitted;

(6)(A) Does not chronically and habitually use an alcoholic beverage to the extent that his or her normal faculties are impaired.

(B) It is presumed that an applicant chronically and habitually uses an alcoholic beverage to the extent that his or her normal faculties are impaired if the applicant has been:

(i) Voluntarily or involuntarily committed as an alcoholic to a treatment facility; or

(ii) Convicted of two (2) or more offenses related to the use of alcohol under a law of this state or similar law of any other state or the United States within the three-year period immediately preceding the date on which the application is submitted;

(7) Desires a legal means to carry a concealed handgun to defend himself or herself;

(8) Has not been adjudicated mentally incompetent;

(9) Has not been voluntarily or involuntarily committed to a mental institution or mental health treatment facility;

(10) Is not a fugitive from justice;

(11) Has satisfactorily completed a training course as prescribed and approved by the director; and

(12) Signs a statement of allegiance to the United States Constitution and the Arkansas Constitution.

(b) The director shall also issue a license to carry a concealed handgun if the applicant is a person who has a valid license to carry a concealed handgun issued by another state and the director determines that:

(1) The eligibility requirements to obtain a license to carry a concealed handgun imposed by the other state are at least as rigorous as the eligibility requirements imposed by this section; and

(2) The other state provides reciprocal licensing privileges to a person who holds a license issued under this subchapter and who has applied for a license to carry a concealed handgun in the other state.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 368, § 1; 1997, No. 1239, § 10; 1999, No. 51, § 1; 2003, No. 545, §§ 1, 5.

Amendments. The 2003 amendment inserted present (1)(A)(i)(a) and

(1)(A)(ii)(b) and made related changes; and deleted “without requiring the person to meet the eligibility or fee requirements” following “director determines” in the introductory paragraph of (2).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Weapons, 26 UALR L.J. 370.

5-73-310. Application form.

The application for a license to carry a concealed handgun shall be completed, under oath, on a form promulgated by the Director of the Department of Arkansas State Police and shall include only:

(1) The name, address, place and date of birth, race, and sex of the applicant;

(2) The driver's license number or social security number of the applicant;

(3) Any previous address of the applicant for the two (2) years preceding the date of the application;

(4) A statement that the applicant is in compliance with criteria contained within §§ 5-73-308(a) and 5-73-309;

(5) A statement that the applicant has been furnished a copy of this subchapter and is acquainted with the truth and understanding of this subchapter;

(6) A conspicuous warning that the application is executed under oath, and that a knowingly false answer to any question or the knowing submission of any false document by the applicant subjects the applicant to:

(A) Criminal prosecution and precludes any future license's being issued to the applicant; and

(B) Immediate revocation if the license has already been issued;

(7) A statement that the applicant desires a legal means to carry a concealed handgun to defend himself or herself;

(8)(A) A statement of whether the applicant is applying for:

(i) An unrestricted license, that allows the person to carry any handgun; or

(ii) A restricted license, that allows the person to carry any handgun other than a semiautomatic handgun.

(B)(i) An applicant requesting an unrestricted license shall establish proficiency in the use of a semiautomatic handgun.

(ii) An applicant requesting a restricted license shall establish proficiency in the use of a handgun and may use any kind of handgun when establishing proficiency; and

(9) A statement of whether or not the applicant has been found guilty of a crime of violence or domestic abuse.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 5; 1999, No. 786, § 1.

5-73-311. Application procedure.

(a) The applicant for a license to carry a concealed handgun shall submit the following to the Department of Arkansas State Police:

(1) A completed application, as described in § 5-73-310;

(2) A nonrefundable license fee of one hundred dollars (\$100);

(3)(A) A full set of fingerprints of the applicant, administered by the department.

(B) In the event a legible set of fingerprints, as determined by the Department of Arkansas State Police and the Federal Bureau of Investigation, cannot be obtained after a minimum of three (3) attempts, the Director of the department shall determine eligibility based upon a name check by the department and the Federal Bureau of Investigation at the request of the director.

(C) Costs for processing the set of fingerprints as required in subdivision (a)(3)(A) of this section shall be borne by the applicant; and

(4)(A) A waiver authorizing the department access to any medical records concerning the applicant and permitting access to all of the applicant's criminal records.

(B) If a check of the applicant's criminal records uncovers any unresolved felony arrests over ten (10) years old, then the applicant shall obtain a letter of reference from the county sheriff, prosecuting attorney, or circuit judge of the county where the applicant resides that states that to the best of the county sheriff's, prosecuting attorney's, or circuit judge's knowledge that the applicant is of good character and free of any felony convictions.

(C) The department shall maintain the confidentiality of the medical records.

(b)(1) Upon receipt of the items listed in subsection (a) of this section, the department shall forward the full set of fingerprints of the applicant to the appropriate agencies for state and federal processing.

(2)(A) The department shall forward a copy of the applicant's application to the sheriff of the applicant's county of residence and, if applicable, the police chief of the applicant's municipality of residence.

(B)(i) The sheriff of the applicant's county of residence and, if applicable, the police chief of the applicant's municipality of residence may participate, at his or her discretion, in the process by submitting a voluntary report to the department containing any readily discoverable information that he or she feels may be pertinent to the licensing of any applicant.

(ii) The reporting shall be made within thirty (30) days after the date the sheriff of the applicant's county of residence or, if applicable, the police chief of the applicant's municipality of residence receives the copy of the application.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 9; 1997, No. 1251, § 1; 1999, No. 487, § 1.

5-73-312. Revocation.

(a)(1) A license to carry a concealed handgun issued under this subchapter shall be revoked if the licensee becomes ineligible under the criteria set forth in §§ 5-73-308(a) and 5-73-309.

(2)(A) Any law enforcement officer making an arrest of a licensee for a violation of this subchapter or any other statutory violation that requires revocation of a license to carry a concealed handgun shall confiscate the license and forward it to the Director of the Department of Arkansas State Police.

(B) The license shall be held until a determination of the charge is finalized, with the appropriate disposition of the license after the determination.

(b) When the Department of Arkansas State Police receives notification from any law enforcement agency or court that a licensee has been found guilty or has pleaded guilty or nolo contendere to any crime involving the use of a weapon, the license issued under this subchapter is immediately revoked.

(c) The director shall revoke the license of any licensee who has pleaded guilty or nolo contendere to or been found guilty of an alcohol-related offense committed while carrying a handgun.

History. Acts 1995, No. 411, §§ 2, 4, 5; 1995, No. 419, §§ 2, 4, 5; 1997, No. 1239, § 11; 2003, No. 545, § 4.

Amendments. The 2003 amendment rewrote (c).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003
Arkansas General Assembly, Criminal
Law, Weapons, 26 UALR L.J. 370.

5-73-313. Expiration and renewal.

(a) No less than ninety (90) days prior to the expiration date of the license to carry a concealed handgun, the Department of Arkansas State Police shall mail to each licensee a written notice of the expiration.

(b) The licensee shall renew his or her license on or before the expiration date by filing with the department:

- (1) A renewal form prescribed by the department;
- (2) A notarized affidavit stating that the licensee remains qualified pursuant to the criteria specified in §§ 5-73-308(a) and 5-73-309; and
- (3) A renewal fee of thirty-five dollars (\$35.00).

(c) The license shall be renewed upon receipt of the completed renewal application and appropriate payment of fees subject to a background investigation conducted pursuant to § 5-73-311.

(d) Additionally, a licensee who fails to file a renewal application on or before the expiration date shall renew his or her license by paying a late fee of fifteen dollars (\$15.00).

(e)(1) No license shall be renewed six (6) months or more after its expiration date, and the license is deemed to be permanently expired.

(2)(A) A person whose license has been permanently expired may reapply for licensure.

(B) An application for licensure and fees pursuant to §§ 5-73-308(a), 5-73-309, and 5-73-311(a) shall be submitted, and a new background investigation shall be conducted.

(f) A new criminal background investigation shall be conducted when an applicant applies for renewal of a license.

(g) Active duty military personnel and reservists on active duty who submit documentation of their active duty status are exempt from the training requirements under § 5-73-309.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, §§ 6, 12; 1999, No. 487, § 2; 2003, No. 545, § 2; 2005, No. 881, § 1.

Amendments. The 2003 amendment added (g).

The 2005 amendment deleted “and a

renewal form prescribed by the Department of Arkansas State Police” at the end of (a); inserted the present subdivision designations in (b) and made related changes; and inserted “prescribed by the department” in present (b)(1).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Weapons, 26 UALR L.J. 370.

5-73-314. Lost or destroyed license — Change of address.

(a) Within thirty (30) days after the changing of a permanent address, or within thirty (30) days after having a license or handgun lost or disposed of, the licensee shall notify the Director of the Department of Arkansas State Police in writing of the change or loss or disposition.

(b) If a concealed handgun license is lost or destroyed, the person to whom the license was issued shall comply with the provisions of subsection (a) of this section and may obtain a duplicate license or substitute license upon:

(1) Payment to the Department of Arkansas State Police of a fee established by the director under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.; and

(2) Furnishing a notarized statement to the department that the handgun or license has been lost or disposed of.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2.

5-73-315. Possession of license — Identification of licensee.

(a) Any person possessing a valid license issued pursuant to this subchapter may carry a concealed handgun.

(b) The licensee shall:

(1) Carry the license, together with valid identification, at any time when the licensee is carrying a concealed handgun; and

(2) Display both the license and proper identification upon demand by a law enforcement officer.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2.

5-73-316. Fees.

Any fee collected by the Department of Arkansas State Police pursuant to this subchapter shall be deposited into the Department of Arkansas State Police Fund.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2.

5-73-317. Rules and regulations.

The Director of the Department of Arkansas State Police may promulgate rules and regulations to permit the efficient administration of this subchapter.

History. Acts 1995, No. 411, § 8; 1995, No. 419, § 8.

5-73-318. Instructor review of applications.

(a) An instructor authorized to conduct a training course required by this subchapter shall check the application of a student for completeness, accuracy, and legibility.

(b) An instructor who repeatedly fails to comply with subsection (a) of this section may have his or her license to conduct a training course revoked.

History. Acts 1997, No. 1239, § 7.

5-73-319. Transfer of a license to Arkansas.

(a) Any person who becomes a resident of Arkansas who has a valid license to carry a concealed handgun issued by a reciprocal state may apply to transfer his or her license to Arkansas by submitting the following to the Department of Arkansas State Police:

- (1) The person's current reciprocal state license;
- (2) Two (2) properly completed fingerprint cards;
- (3) A nonrefundable license fee of thirty-five dollars (\$35.00); and
- (4) Any fee charged by a state or federal agency for a criminal history check.

(b) The newly transferred license is valid for a period of four (4) years from the date of issuance and binds the holder to all Arkansas laws and regulations regarding the carrying of the concealed handgun.

History. Acts 2003, No. 545, § 3.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003
Arkansas General Assembly, Criminal
Law, Weapons, 26 UALR L.J. 370.

5-73-320. License for certain members of the Arkansas National Guard.

(a) The Department of Arkansas State Police may issue a license under this subchapter to a person who:

(1) Is currently serving as a federally recognized commissioned or noncommissioned officer of the National Guard or a reserve component of the armed forces of the United States;

(2) Submits the following documents:

(A) A completed concealed handgun license application as prescribed by the department;

(B) A form specified by the Director of the Department of Arkansas State Police reflecting the fingerprints of the soldier or airman;

(C) A dated letter personally signed by a commanding officer or his or her designee stating that the soldier or airman:

(i) Is a current member of the National Guard or a reserve component of the armed forces of the United States;

(ii) Is of good character and sound judgment;

(iii) Is not disqualified by state or federal law from possessing a firearm;

(iv) Has met the military qualification requirements for issuance and operation of a handgun within one (1) year of the application date; and

(v) Has been a resident of the State of Arkansas for the twelve-month period preceding the application date according to the military and pay records of the soldier or airman;

(D) A copy of the military range qualification score card signed and dated within one (1) year of the application date by a range officer or noncommissioned officer in charge of the range; and

(E) A copy of the face or photograph side of a current United States Uniformed Services military identification card for a member of the armed forces;

(3) Submits any required application fee.

(b)(1) A license issued under this section expires four (4) years from the date of issuance or upon the expiration date of the military identification card of the soldier or airman, whichever occurs first.

(2) A license issued under this section is renewable under the provisions of § 5-73-313 upon satisfaction of the requirements described in subsection (a) of this section.

(c) Except as otherwise specifically stated in this section, the license issued under this section is subject to the provisions of this subchapter and any rules promulgated under § 5-73-317.

History. Acts 2005, No. 1868, § 1.

SUBCHAPTER 4 — CONCEALED HANDGUN LICENSE RECIPROCITY

SECTION.

- 5-73-401. Recognition of other states' permits — Acts 1997, No. 1239.
5-73-402. Recognition of other states' per-

A.C.R.C. Notes. References to "this chapter" in subchapters 1 and 2 may not apply to this subchapter which was enacted subsequently.

5-73-401. Recognition of other states' permits — Acts 1997, No. 789.

Any person in possession of a valid license issued by another state to carry a concealed handgun shall be entitled to the privileges and subject to the restrictions prescribed by Arkansas' concealed handgun law (§ 5-73-301 et seq.) provided that the concealed handgun law of the state that issued the license is at least as restrictive as Arkansas' concealed handgun law and that the state that issued the license recognizes concealed handgun licenses issued under § 5-73-301 et seq. The Director of the Department of State Police shall make a determination as to which states' permits will be recognized in Arkansas and provide that list to every law enforcement agency within the state. The director shall revise the list from time to time and provide the revised list to every law enforcement agency in this state.

History. Acts 1997, No. 789, § 1.

5-73-402. Recognition of other states' permits — Acts 1997, No. 1239.

Any person in possession of a valid license issued by another state to carry a concealed handgun shall be entitled to the privileges and subject to the restrictions prescribed by Arkansas concealed handgun law (§ 5-73-301 et seq.) provided that the state that issued the license recognizes concealed handgun licenses issued under § 5-73-301 et seq. The Director of the Department of State Police shall make a determination as to which states' permits will be recognized in Arkansas and provide that list to every law enforcement agency within the state. The director shall revise the list from time to time and provide the revised list to every law enforcement agency in this state.

History. Acts 1997, No. 1239, § 13.

CHAPTER 74

GANGS

SUBCHAPTER.

- 1. ARKANSAS CRIMINAL GANG, ORGANIZATION, OR ENTERPRISE ACT.
- 2. RECRUITING GANG MEMBERS.

SUBCHAPTER 1 — ARKANSAS CRIMINAL GANG, ORGANIZATION, OR ENTERPRISE ACT

SECTION.

- 5-74-101. Title.
- 5-74-102. General legislative findings, declarations, and intent.
- 5-74-103. Definitions.
- 5-74-104. Engaging in a continuing criminal gang, organization, or enterprise.
- 5-74-105. Unauthorized use of another person's property to facilitate certain crimes.
- 5-74-106. Simultaneous possession of drugs and firearms.

SECTION.

- 5-74-107. Unlawful discharge of a firearm from a vehicle.
- 5-74-108. Engaging in violent criminal group activity.
- 5-74-109. Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies.

A.C.R.C. Notes. Acts 1993, No. 1002, § 4, provided: "All laws and parts of laws in conflict with this act are hereby repealed. However, there is not intent by enactment of the 'Arkansas Criminal Gang, Organization or Enterprise Act' to repeal existing state law governing sub-

stantive criminal offenses, including those mentioned herein, or enhancement of penalties relating to those offenses, and this act is designed to provide alternative remedies to those which exist under current state law."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 16 UALR L.J. 91.

5-74-101. Title.

This subchapter shall be known and may be cited as the "Arkansas Criminal Gang, Organization, or Enterprise Act".

History. Acts 1993, No. 1002, § 1.

5-74-102. General legislative findings, declarations, and intent.

(a)(1) The General Assembly finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of groups engaging in

random crimes of violence, and committing crimes for profit and violent crimes committed to protect or control market areas or "turf".

(2) It is not the intent of this subchapter to interfere with the constitutional exercise of the protected rights and freedoms of expression and association.

(3) The General Assembly recognizes the right of every citizen to harbor and constitutionally express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b)(1) The General Assembly further finds that the State of Arkansas is experiencing an increase in crime committed by criminal gangs, organizations, or enterprises.

(2) These criminal gangs, organizations, or enterprises support themselves by engaging in criminal activity for profit, most commonly through the distribution of controlled substances and theft of property.

(3) These criminal gangs, organizations, or enterprises are becoming increasingly sophisticated at avoiding arrest and prosecution.

(4) With increasing frequency, criminals are using the property of another person which has been stolen, borrowed, leased, or maintained in another person's name to avoid detection and identification.

(5) This is particularly common among members and associates of criminal gangs, organizations, and enterprises.

(6) There is strong evidence that this increased sophistication is due largely to contact with other criminal gangs, organizations, or enterprises from other states.

(c)(1) The General Assembly further finds that criminal gangs, organizations, and enterprises control their market areas by terrorizing the peaceful citizens in their neighborhoods with deliberate and random acts of violence.

(2) "Drive-by" shootings are becoming all too common in many Arkansas cities.

(3) One of the primary reasons for the increased homicide rate is the use of firearms by criminal gangs, organizations, or enterprises to control the crack cocaine market within their geographical "turf".

(d)(1) The General Assembly further finds that in addition to the activity of street gangs, there are also other types of criminal organizations or enterprises operating in Arkansas.

(2) Some examples are garages that take parts from stolen automobiles, burglary or retail theft rings, and narcotics distribution organizations.

(3) The number of crimes committed by criminal organizations of all types is increasing.

(4) These ongoing organized criminal activities present a clear and present danger to public order and safety and are not constitutionally protected.

(e)(1) It is the intent of the General Assembly to use as a model the federal continuing criminal enterprise statute, 21 U.S.C. § 848.

(2) This should provide law enforcement officers, prosecutors, and our courts with ample case law to guide in the interpretation of the language and the legislative intent.

(3) It is furthermore the intent of the General Assembly to focus the state's law enforcement agencies and prosecutors on investigating and prosecuting all ongoing organized criminal activity and to provide for penalties that will punish and deter organized ongoing criminal activity.

History. Acts 1993, No. 1002, § 1;
1995, No. 1296, § 9.

CASE NOTES

In General.

The General Assembly intended to address violence in the drug trade by making laws tougher on drug dealers who use

firearms. *Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997).

Cited: *Curtis v. State*, 76 Ark. App. 458, 68 S.W.3d 305 (2002).

5-74-103. Definitions.

As used in this subchapter:

(1) "Crime of pecuniary gain" means any violation of Arkansas law that results, or was intended to result, in the defendant receiving income, benefit, property, money, or anything of value;

(2) "Crime of violence" means any violation of Arkansas law if a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person, specifically including rape;

(3) "Criminal gang, organization, or enterprise" means any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses that are undertaken in concert with each other; and

(4) "Predicate criminal offense" means any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain.

History. Acts 1993, No. 1002, § 1.

CASE NOTES

Cited: *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998).

5-74-104. Engaging in a continuing criminal gang, organization, or enterprise.

(a)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the first degree if he or she:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in

concert with two (2) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.

(2) A person who engages in a continuing criminal gang, organization, or enterprise in the first degree is guilty of a felony two (2) classifications higher than the classification of the highest underlying predicate offense referenced in subdivision (a)(1)(A) of this section.

(b)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the second degree if he or she:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons, but with respect to whom that person does not occupy the position of organizer, a supervisory position, or any other position of management.

(2) A person who engages in a continuing criminal gang, organization, or enterprise in the second degree is guilty of a felony one (1) classification higher than the classification of the highest underlying predicate offense referenced in subdivision (b)(1)(A) of this section.

(c) A person who engages in a continuing criminal gang, organization, or enterprise when the underlying predicate offense is a Class A felony or a Class Y felony guilty of a Class Y felony.

(d) Any sentence of imprisonment imposed pursuant to this section is in addition to any sentence imposed for the violation of a predicate criminal offense.

History. Acts 1993, No. 1002, § 1.

CASE NOTES

Predicate Criminal Offense.

A predicate criminal offense for the purposes of this section need not be proved by

a conviction or even a formal charge. *Garling v. State*, 334 Ark. 368, 975 S.W.2d 435 (1998).

5-74-105. Unauthorized use of another person's property to facilitate certain crimes.

(a)(1) A person commits the offense of unauthorized use of another person's property to facilitate a crime if he or she knowingly uses the property of another person to facilitate in any way the violation of a predicate criminal offense without the owner's knowledge.

(2) A violation of this section is a Class B felony.

(b) The State of Arkansas is the victim in any violation of this section.

History. Acts 1993, No. 1002, § 1.

CASE NOTES

ANALYSIS

Constitutionality.

—Federal law.

Constitutionality.

—Federal Law.

The Supreme Court did not allow the State an ARCrP 36.10 appeal because no substantial question of former jeopardy existed when federal and state offenses

and proceedings were involved; since the state offense involving interpretation of subdivision (a)(1) of this section and § 5-74-107(b)(1) would not come into issue in the same manner due to a decision concerning the unconstitutionality of a federal law, Arkansas's correct and uniform administration of the criminal law was not in issue. *State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995).

5-74-106. Simultaneous possession of drugs and firearms.

(a) No person shall unlawfully commit a felony violation of § 5-64-401 or unlawfully attempt, solicit, or conspire to commit a felony violation of § 5-64-401 while in possession of:

(1) A firearm; or

(2) Any implement or weapon that may be used to inflict serious physical injury or death, and that under the circumstances serves no apparent lawful purpose.

(b) Any person who violates this section is guilty of a Class Y felony.

(c) This section does not apply to a misdemeanor drug offense.

(d) It is a defense to this section that the defendant was in his or her home and the firearm was not readily accessible for use.

History. Acts 1993, No. 1002, § 1.

CASE NOTES

ANALYSIS

Constitutionality.

Purpose.

Double jeopardy.

Elements of offense.

Evidence.

Readily accessible.

Sentence.

—Suspension prohibited.

Constitutionality.

This section does not unconstitutionally overlap or conflict with § 5-73-120. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

This section does not violate the federal constitutional right to bear arms. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

Purpose.

This section not only serves the purpose of deterring organized gang and criminal activities, but also serves the broader pur-

pose of curtailing any person's use of a firearm when he or she is involved in the illegal possession or trafficking of controlled substances. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

Double Jeopardy.

There was no double jeopardy violation where defendant was sentenced for violating both § 5-64-401(a)(1)(i) (possession with intent to deliver a controlled substance) and this section (simultaneous possession of drugs and firearms); the legislature made it clear that it wished to assess an additional penalty for simultaneously possessing drugs and a firearm. *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000).

Elements of Offense.

Evidence of gang-related activity is not required to establish a violation of this section. *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), cert. denied, 522

U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

Defendant, who waited outside his residence during a police search of his residence during which officers found a nine millimeter pistol in a sock along with methamphetamine, could not avail himself of the defense to the charge of simultaneous possession of a firearm contained in subsection (d) of this section; the defense requires that defendant be in the home when the handgun is being discovered. *Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002).

Evidence.

Evidence held sufficient to support simultaneous possession. *Mitchell v. State*, 321 Ark. 570, 906 S.W.2d 307 (1995).

There was substantial evidence that defendant knew of and had control of contraband, possessed it with the intent to deliver, had simultaneous possession of cocaine and firearm, and that he was a felon in possession of a firearm. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995).

Evidence held sufficient where (1) while most of the controlled substance was found in a car's rear fender well, some was found in the front passenger seat, (2) a pistol was found on the floor behind the driver's seat, and (3) the defendant was the sole occupant of the car. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998).

Evidence was insufficient to support a conviction for simultaneous possession of a controlled substance and a firearm where (1) after stopping a vehicle operated by the defendant and a vehicle operated by his cousin's boyfriend, the defendant was not allowed to continue driving because of his level of intoxication and his vehicle was subjected to an inventory search in preparation for towing, and (2) during the search, a suitcase containing marijuana was found in the trunk, but (3) the cousin's boyfriend asked the defendant to carry the suitcase in his trunk, the suitcase was found with other items belonging to the cousin and her boyfriend, (4) the marijuana was well-wrapped inside several bags and no odor emanated from the suitcase, (5) the cousin's boyfriend's fingerprint was found on one of the plastic bags, whereas the defendant's

fingerprints were not found on any of the items seized by the state, and (6) the reason for the defendant's trip was to visit his sick brother, who died during the pendency of the trial. *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000).

Stop was not justified where there was no testimony that the officer was investigating or preventing a crime when she encountered defendant, therefore, the search was illegal and defendant's motion to suppress the evidence of the cocaine and the firearm should have been granted. *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

Evidence was sufficient to support a conviction where, upon executing a search warrant at the defendant's house, the police found (1) 10 grams of pure methamphetamine in the defendant's pants pocket, (2) drug paraphernalia throughout the house, (3) an unloaded handgun in the living room, with a bag with ammunition in a nearby paper bag, and (4) bills and receipts with the defendant's name on them in close proximity to the handgun. *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000).

Evidence was sufficient to support a conviction, notwithstanding the defendant's assertion that she did not possess a useable amount of the controlled substance, where she was convicted of manufacture of methamphetamine and she abandoned her argument that there was insufficient evidence presented by the state to prove that she possessed a firearm. *Harris v. State*, 73 Ark. App. 185, 44 S.W.3d 347 (2001).

Evidence was sufficient to support a conviction where (1) the defendant's girlfriend testified that she observed the defendant asleep with his gun either laying on his chest or in his hand, that the gun had a laser sight on it, and that she also observed a bag of drugs near him, and (2) a police officer testified that he found the gun on the floor in the room where the defendant had fallen asleep and described the general connection between firearms and drugs, testifying that of the 50 methamphetamine labs he had seen in the last three years, he could not recall one in which a firearm was not found. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001).

Evidence was sufficient to convict defendant of simultaneous possession of drugs and firearms, in violation of subdivision

(a)(1) of this section, because the police discovered loaded weapons in the same out-building where methamphetamine had recently been manufactured in violation of § 5-64-401(a)(1)(i). *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004).

Evidence was sufficient to sustain defendant's conviction for possession of drugs and firearms where, during execution of a search warrant, a loaded pistol and marijuana were located within mere feet of each other, both concealed below the cushions of the same couch; further, the marijuana was packaged for individual sale. *Crawford v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 696 (Sept. 28, 2005).

Readily Accessible.

A loaded handgun, although wrapped in a ski mask in a closet in a different room, was within defendant's easy reach and was therefore "readily accessible for use." *Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997).

The defendant's conviction for simultaneous possession of a controlled substance and a firearm was reversed where a .22 caliber rifle was recovered from the kitchen of her residence, but the rifle was not readily accessible for use because it was not loaded, and no ammunition was recovered. *Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001).

Sentence.

Sentencing may not be other than in

accordance with the statute in effect at the time of the commission of the crime, and where the law does not authorize the particular sentence pronounced by a trial court, that sentence is unauthorized and illegal. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

When a defendant is convicted of a Class Y felony, the General Assembly has specifically provided that a trial court shall not suspend imposition of sentence as to a term of imprisonment or place the defendant on probation. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

—Suspension Prohibited.

The trial court had no statutory authority to suspend the imposition of sentence or to suspend execution of the 10-year sentence on the Class Y felony charge of simultaneous possession of drugs and firearms. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

Defendant's conviction for simultaneous possession of drugs and firearms was a violation of this section and a Class Y felony, and under § 5-4-401(a)(1), a defendant convicted of a Class Y felony was to be sentenced to not less than 10 years; consequently, the trial court erred in suspending 4 years of the 10 year sentence imposed upon defendant. *State v. Fountain*, 350 Ark. 437, 88 S.W.3d 411 (2002).

Cited: *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997); *Curtis v. State*, 76 Ark. App. 458, 68 S.W.3d 305 (2002).

5-74-107. Unlawful discharge of a firearm from a vehicle.

(a)(1) A person commits unlawful discharge of a firearm from a vehicle in the first degree if he or she knowingly discharges a firearm from a vehicle and by the discharge of the firearm causes death or serious physical injury to another person.

(2) Any person who is guilty of unlawfully discharging a firearm from a vehicle in the first degree commits a Class Y felony.

(b)(1) A person commits unlawful discharge of a firearm from a vehicle in the second degree if he or she recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence, or other occupiable structure.

(2) Any person who is guilty of unlawfully discharging a firearm from a vehicle in the second degree commits a Class B felony.

(c)(1)(A) Any vehicle or property used by the owner, or anyone acting with the knowledge and consent of the owner, to facilitate a violation of this section is subject to forfeiture.

(B) This is a new and independent ground for forfeiture.

(2)(A) Property that is forfeitable based on this section is forfeited pursuant to and in accordance with the procedures for forfeiture in §§ 5-64-505 and 5-64-509.

(B) The reference to §§ 5-64-505 and 5-64-509 is procedural only, and it is not a defense to forfeiture under this section that the shooting did not involve a controlled substance.

History. Acts 1993, No. 1002, § 1.

CASE NOTES

ANALYSIS

Constitutionality.

—Federal law.

Constitutionality.

—Federal Law.

The Supreme Court did not allow the State an ARCrP 36.10 appeal because no substantial question of former jeopardy existed when federal and state offenses and proceedings were involved; since the state offense involving interpretation of

§ 5-74-105(a)(1) and subdivision (b)(1) of this section would not come into issue in the same manner due to a decision concerning the unconstitutionality of a federal law, Arkansas's correct and uniform administration of the criminal law was not in issue. *State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995).

Cited: *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Nelson v. State*, 324 Ark. 404, 921 S.W.2d 593 (1996); *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915 (1996).

5-74-108. Engaging in violent criminal group activity.

(a) Any person who violates any provision of Arkansas law that is a crime of violence while acting in concert with two (2) or more other persons is subject to enhanced penalties.

(b) Upon conviction of a crime of violence committed while acting in concert with two (2) or more other persons, the classification and penalty range is increased by one (1) classification.

(c) The fact that the group was not a criminal gang, organization, or enterprise is not a defense to prosecution under this section.

History. Acts 1993, No. 1002, § 1.

CASE NOTES

ANALYSIS

Constitutionality.

Enhanced classification.

Constitutionality.

This section conveys fair and sufficient warning when measured by common understanding and, therefore, is not unconstitutionally vague. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998).

Enhanced Classification.

Engaging in violent criminal activity as

enumerated in this section would not be a Class D felony in itself but rather would raise a third-degree battery Class A misdemeanor to a Class D felony. *B.J. v. State*, 56 Ark. App. 35, 937 S.W.2d 675 (1997).

Engaging in violent criminal activity is merely an enhancement of punishment statute, not a substantive offense. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998).

5-74-109. Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies.

(a) **INTENT.** The intent of the General Assembly in this section is to enact civil remedies that eliminate the availability of any premises for use in the commission of a continuing series of criminal offenses.

(b) **COMMON NUISANCE DECLARED.** Any premises, building, or place used to facilitate the commission of a continuing series of three (3) or more criminal violations of Arkansas law is declared to be detrimental to the law-abiding citizens of the state and may be subject to an injunction, a court-ordered eviction, or a cause of action for damages as provided for in this subchapter.

(c) **ACTION TO ABATE — PERMANENT INJUNCTION — VERIFICATION OF COMPLAINT.** (1) When there is reason to believe a common nuisance under subsection (b) of this section is kept or maintained, or exists in any county, the prosecuting attorney of the county in the name of the state, or the city attorney of any incorporated city, or any citizen of the state or a resident of the county in his or her own name, may enjoin permanently the person conducting or maintaining the nuisance and the owner, lessee, or agent of the building or place in or upon which the nuisance exists from directly or indirectly maintaining or permitting the nuisance.

(2) Unless filed by the prosecuting attorney, the complaint in the action shall be verified.

(d) **INSPECTION WARRANT.** When there is reasonable cause to believe that any premises is being maintained in violation of this section, any judicial officer may, upon the petition of the prosecuting attorney, issue an inspection warrant for the premises.

(e) **TEMPORARY INJUNCTION — BOND REQUIRED — EXCEPTIONS.** (1) If the existence of the nuisance is shown in the action to the satisfaction of the court, the court shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of the nuisance.

(2)(A) On granting the temporary writ, the court shall require a bond on the part of the applicant to the effect that the applicant shall pay to the enjoined defendant such damages, not exceeding an amount to be specified, as the defendant sustains by reason of the injunction should the court finally decide that the applicant was not entitled to the injunction.

(B) No bond is required when the proceeding is instituted by the prosecuting attorney or city attorney.

(f) **PRECEDENCE OF ACTION — EXCEPTIONS.** The action shall be filed in the circuit court and have precedence over all other actions except election contests and hearings on injunctions.

(g) **DISMISSAL FOR WANT OF PROSECUTION.** If the complaint is filed by a citizen, it shall not be dismissed by him or her or for want of prosecution except upon a sworn statement made by him or her setting forth the

reasons why the action shall be dismissed, and by dismissal ordered by the court.

(h) COSTS. If the action is brought by a citizen and the court finds there was reasonable ground or cause for the action, costs shall be assessed against him or her.

(i) ORDER OF ABATEMENT — LIEN FOR COSTS — ENFORCEMENT. (1) If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment in the case, and the plaintiff's costs in carrying out the order are a lien upon the building or place.

(2) The lien is enforceable and collectible for execution issued by order of the court.

(j) ORDER OF ABATEMENT — DAMAGES. (1) If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment, and the order shall direct the removal from the building or place of all fixtures and other movable property used in conducting, maintaining, aiding, or abetting the nuisance and shall direct their sale in the manner provided for the sale of chattels under execution.

(2)(A) The order shall provide for any appropriate equitable relief as determined by the court to be necessary to abate the nuisance and may further provide, if determined to be the least restrictive alternative available to effectively accomplish the abatement, for the effectual closing of the building or place for such period of time as determined to be necessary by the court as adequate to abate the nuisance.

(B) An alternative to closure may be considered only as provided in this section.

(3)(A)(i) If the court finds that any vacancy resulting from closure of the building or place may create a nuisance or that closure is otherwise harmful to the community, in lieu of ordering the building or place closed, the court may order the person who is seeking to keep the premises open to pay damages in an amount equal to the fair market rental value of the building or place, for such period of time as determined appropriate by the court, to the city attorney or county prosecutor.

(ii) These funds are to be used to investigate and litigate future nuisance abatement actions, or the funds are to be used by the city or county in whose jurisdiction the nuisance is located for the purpose of carrying out its drug prevention and education programs.

(iii) If awarded to a city, eligible programs may include those developed as a result of cooperative programs among schools, community agencies, and the local enforcement agency.

(iv) If awarded to a county, funds shall be used for those programs that are part of any county program in place or used by the county law enforcement agency.

(v) These funds shall not be used to supplant existing city, county, state, or federal resources used for drug prevention and education programs.

(B)(i) For purpose of subdivision (j)(3) of this section, the actual amount of rent being received for the rent of the building or place, or the existence of any vacancy in the building or place, may be considered, but shall not be the sole determinant of the fair market rental value.

(ii) Expert testimony may be used to determine the fair market rental value.

(4)(A) In addition, the court may award damages equal to the plaintiff's cost in the investigation and litigation of the abatement action, not to exceed five thousand dollars (\$5,000), against any defendant based upon the severity of the nuisance and its duration.

(B) The damages may be collected in any manner provided for the collection of any civil judgment.

(k) CUSTODY OF BUILDING. While the order of abatement remains in effect, the building or place is in the custody of the court.

(l) FEES — CLOSING OF BUILDING OR PLACE. For removing and selling the movable property, the city, county, or responsible law enforcement agency is entitled to charge and receive the same fees as could be charged and received for levying upon and selling like property on execution, and for closing the premises and keeping the premises closed, a reasonable sum shall be allowed by the court.

(m) DISPOSITION OF SALE PROCEEDS. The proceeds of the sale of the movable property shall be applied as follows:

(1) First, to the fees and costs of the removal and sale;

(2) Second, to the allowances and costs of closing and keeping closed the building or place;

(3) Third, to the payment of the plaintiff's costs in the action; and

(4) Fourth, the balance, if any, to the owner of the property.

(n) RELEASE OF THE BUILDING TO OWNER. (1) If the owner of the building or place has not been guilty of any contempt of court in the proceedings and appears and pays all costs, fees, and allowances that are liens on the building or place and files a bond in the full value of the property conditioned that the owner shall immediately abate any nuisance that may exist at the building or place and prevent it from being a nuisance within a period of one (1) year thereafter, the court may, if satisfied of the owner's good faith, order the building or place to be delivered to the owner and the order of abatement cancelled so far as it may relate to the property.

(2) The release of property under a provision of this section does not release it from any judgment, lien, penalty, or liability to which it may be subject.

(o) FINE AS LIEN — ENFORCEMENT. (1) When the owner of a building or place upon which the act or acts constituting contempt have been committed, or the owner of any interest in the building or place, has been guilty of contempt of court and fined in any proceeding under this subchapter, the fine is a lien upon the building or place to the extent of his or her interest in it.

(2) The lien is enforceable and collectible by execution issued by order of the court.

(p) **VIOLATIONS — CRIMINAL PENALTIES.** A violation of or disobedience of an injunction or order for abatement is punishable as contempt of court by a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not less than one (1) month nor more than six (6) months, or by both.

(q) **FORFEITURE.** (1) This section does not provide for the property to be forfeited to the state.

(2) However, the state may at any time amend its petition to seek forfeiture if the property is subject to forfeiture under other Arkansas law.

History. Acts 1993, No. 1002, § 1; 1995, No. 1296, § 10.

Cross References. Common nuisance declared, § 16-105-402.

Criminal nuisance abatement boards, § 14-54-1701 et seq.

Municipal corporations' powers and restrictions, § 14-54-102.

Prostitution, § 5-70-102.

SUBCHAPTER 2 — RECRUITING GANG MEMBERS

SECTION.

5-74-201. Legislative findings.

5-74-202. Definitions.

5-74-203. Soliciting or recruiting a minor

to join or to remain a member of a criminal gang, organization, or enterprise.

Effective Dates. Acts 1994 (2nd Ex. Sess.), Nos. 33 and 34, § 7: Aug. 25, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas, meeting in the Second Extraordinary Session of 1994, that street gangs have become rampant in our communities and that such gangs recruit minors to

engage in criminal activity. Therefore, in order to create the crime of soliciting a minor to join a street gang, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

5-74-201. Legislative findings.

(a)(1) The General Assembly finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, sex, age, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of groups engaging in random crimes of violence, and committing crimes for profit and violent crimes committed to protect or control market areas or "turf".

(2) It is not the intent of this subchapter to interfere with the constitutional exercise of the protected rights and freedoms of expression and association.

(3) The General Assembly recognizes the right of every citizen to harbor and constitutionally express beliefs on any lawful subject whatsoever, to associate lawfully with others who share similar beliefs,

to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process.

(b)(1) The General Assembly further finds that the State of Arkansas is experiencing an increase in crime committed by criminal gangs, organizations, or enterprises.

(2) These criminal gangs, organizations, or enterprises support themselves by engaging in criminal activity for profit, most commonly through the distribution of controlled substances and theft of property.

(3) These criminal gangs, organizations, or enterprises are becoming increasingly sophisticated at avoiding arrest and prosecution.

(4) With increasing frequency, criminals are using the property of another person which has been stolen, borrowed, leased, or maintained in another person's name to avoid detection and identification.

(5) This is particularly common among members and associates of criminal gangs, organizations, and enterprises.

(6) There is strong evidence that this increased sophistication is due largely to contact with other criminal gangs, organizations, or enterprises from other states.

(c)(1) The General Assembly further finds that criminal gangs, organizations, and enterprises control their market areas by terrorizing the peaceful citizens in their neighborhoods with deliberate and random acts of violence.

(2) "Drive-by" shootings are becoming all too common in many Arkansas cities.

(3) One of the primary reasons for the increased homicide rate is the use of firearms by criminal gangs, organizations, or enterprises to control the crack cocaine market within their geographical "turf".

(d)(1) The General Assembly further finds that in addition to the activity of street gangs, there are also other types of criminal organizations or enterprises operating in Arkansas.

(2) Some examples are garages that take parts from stolen automobiles, burglary or retail theft rings, and narcotics distribution organizations.

(3) The number of crimes committed by criminal organizations of all types is increasing.

(4) These ongoing organized criminal activities present a clear and present danger to public order and safety and are not constitutionally protected.

History. Acts 1994 (2nd Ex. Sess.), No. 33, § 1; 1994 (2nd Ex. Sess.), No. 34, § 1; 1995, No. 1296, § 11.

5-74-202. Definitions.

As used in this subchapter:

(1) "Crime of pecuniary gain" means any violation of Arkansas law that results, or was intended to result, in the defendant's receiving income, benefit, property, money, or anything of value;

(2) "Crime of violence" means any violation of Arkansas law if a person purposely or knowingly causes, or threatens to cause, death or physical injury to another person, specifically including rape, § 5-14-103;

(3) "Criminal gang, organization, or enterprise" means any group of three (3) or more individuals who commit a continuing series of two (2) or more predicate criminal offenses that are undertaken in concert with each other; and

(4) "Predicate criminal offense" means any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain.

History. Acts 1994 (2nd Ex. Sess.), No. 33, § 2; 1994 (2nd Ex. Sess.), No. 34, § 2.

5-74-203. Soliciting or recruiting a minor to join or to remain a member of a criminal gang, organization, or enterprise.

(a) Any person who by intimidation or duress causes, aids, abets, encourages, solicits, or recruits a minor to become or to remain a member of any group that the person knows to be a criminal gang, organization, or enterprise that falls into the definition and intent of this subchapter is guilty of a Class C felony.

(b) Any person who is found guilty of or who pleads guilty or nolo contendere to a second or subsequent violation of this section is guilty of a Class B felony.

History. Acts 1994 (2nd Ex. Sess.), No. 33, § 3; 1994 (2nd Ex. Sess.), No. 34, § 3.

CHAPTER 75

OPERATION OF AIRCRAFT WHILE INTOXICATED

SECTION.

5-75-101. Definitions.

5-75-102. Unlawful acts.

5-75-103. Implied consent.

5-75-104. Administration.

SECTION.

5-75-105. Validity — Approved methods.

5-75-106. Criminal prosecution — Evidence.

5-75-107. Blood alcohol testing devices.

5-75-101. Definitions.

As used in this chapter:

(1) "Aircraft" means any contrivance invented, used, or designed for the navigation of or flight in the air, and that is required to be registered under the laws of the United States;

(2)(A) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I-VI.

(B) The fact that any person charged with a violation of this chapter is or has been entitled to use that drug or controlled substance under the laws of this state does not constitute a defense against any charge of violating this chapter; and

(3) “Intoxicated” means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the operator’s or navigator’s reactions, motor skills, and judgment are substantially altered and the operator or navigator, therefore, constitutes a clear and substantial danger of physical injury or death to himself or herself and other persons.

History. Acts 1993, No. 824, § 1.

under subchapter 2 of Chapter 64 of this title.

Publisher’s Notes. Regarding Schedules I-VI controlled substances, see note

5-75-102. Unlawful acts.

(a)(1) It is unlawful and punishable as provided in this chapter for any person who is intoxicated to operate, navigate, or be in actual physical control of any aircraft.

(2) It is unlawful and punishable as provided in this chapter for any person to operate, navigate, or be in actual physical control of any aircraft if at that time there was an alcohol concentration of four-hundredths (0.04) or more in the person’s breath or blood as determined by a chemical test of the person’s blood, urine, breath, or other bodily substance.

(3) It is unlawful and punishable as provided in this chapter for any person who is at an airport to perform his or her duties as a member of the flight crew of an aircraft and who has an alcohol concentration of four-hundredths (0.04) or more in the person’s breath or blood as determined by a chemical test of the person’s blood, urine, breath, or other bodily substance, to:

(A) Present himself or herself at:

- (i) The security checkpoint at the airport;
- (ii) The security identification area; or
- (iii) An aircraft ramp; or

(B) Plan and accept flight documents at the ticket counter or gate.

(b)(1) Any person who pleads guilty or nolo contendere to or is found guilty of violating subsection (a) of this section is guilty of a Class A misdemeanor.

(2) For a second offense occurring within one (1) year, any person who pleads guilty or nolo contendere to or is found guilty of violating subsection (a) of this section is guilty of a Class D felony.

(3) Any person who pleads guilty or nolo contendere to or is found guilty of violating subsection (a) of this section and who at the time of the offense was a flight crew member and was in possession of a weapon is guilty of a Class D felony.

(c)(1)(A) If a person under arrest for violating subsection (a) of this section refuses upon the request of a law enforcement officer to submit to a chemical test as provided in § 5-75-103, no chemical test shall be given.

(B) However, any person who refuses to submit to a chemical test as provided for in § 5-75-103 is guilty of a Class A misdemeanor.

(2) For a second offense occurring within one (1) year, any person who refuses to submit to a chemical test as provided for in § 5-75-103 is guilty of a Class D felony.

(d) A complete report of any arrest or conviction made under the provisions of this chapter shall be forwarded to the Federal Aviation Administration or any other agency responsible for the licensing of pilots or navigators.

History. Acts 1993, No. 824, § 2; 2001, No. 561, § 17; 2003, No. 1267, § 1.

Amendments. The 2001 amendment substituted “an alcohol concentration of ... breath or blood” for “four-hundredths of one percent (0.04%) or more by weight of alcohol in the person’s blood” in (b).

The 2003 amendment inserted the (a)(1) subdivision designation; redesignated

former (b) as present (a)(2); added (a)(3); redesignated former (c) as present (b); deleted “or (b)” following “subsection (a)” in present (b)(1) and (b)(2); added (b)(3); redesignated former (d)(1) as present (c)(1)(A) and (c)(1)(B); deleted “or (b)” following “subsection” in present (c)(1)(A); redesignated former (e) as present (d); and made related changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-75-103. Implied consent.

(a) Any person who operates or navigates any aircraft or is in actual physical control of any aircraft in this state is deemed to have given consent, subject to the provisions of § 5-75-104, to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood, if:

(1) The operator or navigator is arrested for any offense arising out of an act alleged to have been committed while the person was operating or navigating any aircraft while intoxicated or operating or navigating any aircraft while there was an alcohol concentration of four-hundredths (0.04) or more in the person’s breath or blood;

(2) The person is involved in an accident while operating, navigating, or in actual physical control of any aircraft; or

(3) The person is stopped by a law enforcement officer who has reasonable cause to believe that the person, while operating, navigating, or in actual physical control of any aircraft, is intoxicated or has an alcohol concentration of four-hundredths (0.04) or more in his or her breath or blood.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to the provisions of § 5-75-104.

History. Acts 1993, No. 824, § 3; 2001, No. 561, § 18.

Amendments. The 2001 amendment inserted “breath or” in (a), (a)(1), and

(a)(3); and substituted “an alcohol concentration ... in the person’s” for “four-hundredths of one percent (0.04%) or more of alcohol in the person’s” in (a)(1) and (a)(3).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-75-104. Administration.

(a) A chemical test shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating, navigating, or in actual physical control of any aircraft while:

- (1) Intoxicated; or
- (2) There was an alcohol concentration of four-hundredths (0.04) or more in the person’s breath or blood.

(b)(1) The law enforcement agency by which that law enforcement officer is employed shall designate which chemical test shall be administered, and the law enforcement agency is responsible for paying any expense incurred in conducting a chemical test.

(2) If the person tested requests that an additional chemical test be made, as authorized in § 5-75-105, the cost of the additional chemical test shall be borne by the person tested.

(3) If any person shall object to the taking of his or her blood for a chemical test, as authorized in this section, the breath or urine of the person may be used to make the analysis.

History. Acts 1993, No. 824, § 4; 2001, No. 561, § 19.

Amendments. The 2001 amendment substituted “an alcohol concentration ...

breath or blood” for “four-hundredths of one percent (0.04%) or more of alcohol in the person’s blood” in (a).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-75-105. Validity — Approved methods.

- (a)(1) “Alcohol concentration” means either:
- (A) Grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood; or
 - (B) Grams of alcohol per two hundred ten liters (210 l) of breath.
- (2) The alcohol concentration of any other bodily substance shall be based upon grams of alcohol per one hundred milliliter^s (100 ml) or one hundred cubic centimeters (100 cc) of blood, the same being percent weight per volume or percent alcohol concentration.

(b)(1) To be considered valid under the provisions of this chapter, a chemical analysis of a person’s blood, urine, or breath shall be per-

formed according to a method approved by the Division of Health of the Department of Health and Human Services or by an individual possessing a valid permit issued by the division for that purpose.

(2) The division may:

(A) Approve a satisfactory technique or method for the chemical analysis;

(B) Ascertain the qualifications and competence of an individual to conduct the chemical analysis; and

(C) Issue a permit to conduct the chemical analysis that is subject to termination or revocation at the discretion of the division.

(c) To be considered valid under the provisions of this section, a chemical analysis of a person's blood, urine, breath, or other bodily substance for determining the alcohol content of the breath or blood shall be performed according to a method approved by the State Board of Health.

(d)(1) When a person submits to a blood test at the request of a law enforcement officer under the provisions of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.

(2) The limitation in subdivision (d)(1) of this section does not apply to the taking of a breath or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person of the right provided in subdivision (e)(1) of this section.

(3) The refusal or failure of a law enforcement officer to advise the person of the right provided in subdivision (e)(1) of this section and to permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to the chemical test taken at the direction of a law enforcement officer.

(f) Upon the request of a person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or his or her attorney.

History. Acts 1993, No. 824, § 5; 2001, inserted “breath or” following “alcohol content of the” in (c).

Amendments. The 2001 amendment

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

5-75-106. Criminal prosecution — Evidence.

(a) In any criminal prosecution of a person charged with the offense of operating or navigating any aircraft while intoxicated, the amount of alcohol in the defendant’s breath or blood at the time or within two (2) hours of the alleged offense, as shown by chemical analysis of the defendant’s blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration less than four-hundredths (0.04) in the defendant’s blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration of four-hundredths (0.04) or more in the defendant’s blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) Subsection (a) shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1)(A) A record or report of a certification, rule, evidence, analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure, when duly attested to by the Director of the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services or an assistant, in the form of an original signature or by certification of a copy.

(B) These documents are self-authenticating.

(2) However, the instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Nothing in this section is deemed to abrogate a defendant’s right of cross-examination of the person who performs the calibration test or

check on the instrument, the operator of the instrument, or a representative of the office.

(4) The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena ten (10) days prior to the date of the hearing or trial, in which case, the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

History. Acts 1993, No. 824, § 6; 2001, No. 561, §§ 21, 22.

Amendments. The 2001 amendment inserted "breath or" in (a); substituted "an alcohol concentration ... in the defendant's" for "less than four-hundredths of one percent (0.04%) by weight of alcohol in the defendant's" in (a)(1); in (a)(2), substituted "an alcohol concentration ... in the defendant's" for "four-hundredths of one percent (0.04%) or more by weight of alcohol in the defendant's" and "this fact" for

"such fact"; in (d)(1), substituted "Office of Alcohol Testing" for "blood alcohol program" and "Director of the Office of Alcohol Testing or an assistant" for "program director or his assistant"; in (d)(2), substituted "instrument performing" for "machine performing," "one (1) time" for "once" and "of the instrument" for "thereof"; rewrote (d)(3); and inserted "ten (10) days prior to the date of the hearing or trial" in (d)(4).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-75-107. Blood alcohol testing devices.

(a)(1) Any instrument used to determine the alcohol content of the breath of any person by analysis of the breath of the person for the purpose of determining if the person was operating or navigating any aircraft while intoxicated or with an alcohol concentration of four-hundredths (0.04) or more shall be so constructed that the analysis is made automatically when a sample of the person's breath is placed in the instrument and without any adjustment or other action of the person administering the analysis.

(2) The instrument shall be so constructed that the breath alcohol content is shown by visible digital display on the instrument and on an automatic readout.

(b) Any breath analysis made by or through the use of a machine or instrument that does not conform to the requirements prescribed in this section is inadmissible in any criminal or civil proceeding.

(c)(1) The State Board of Health may adopt appropriate rules and regulations to carry out the intent and purposes of this section, and only an instrument approved by the board as meeting the requirements of this section and the regulations of the board shall be used for making a breath analysis for determining breath alcohol concentration.

(2)(A) The Division of Health of the Department of Health and Human Services specifically may limit by its rules the types or models of testing devices that may be approved for use in Arkansas for the purposes set forth in this section.

(B) The approved types or models shall be specified by manufacturer’s name and model.

History. Acts 1993, No. 824, § 7; 2001, No. 561, §§ 23, 24.

A.C.R.C. Notes. As enacted by Acts 1993, No. 824, § 7, this section contained a subsection (d) which read: “All law enforcement agencies which conduct blood alcohol testing shall be in full compliance with the provisions of this act by July 1, 1993.” The act did not have an emergency clause.

Amendments. The 2001 amendment redesignated former (a) as present (a)(1) through (a)(2) and made related changes; deleted “machine or” preceding “instrument” in (a)(1) and (c)(1); in (a)(1), deleted “or blood” preceding “of any person” and substituted “an alcohol concentration of four-hundredths (0.04)” for “a blood alcohol content of four hundredths of one percent (0.04%)”; in (a)(2), substituted “instrument” for “machine” and “breath” for “blood”; and substituted “breath alcohol concentration” for “blood alcohol content” in (c)(1).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001
Arkansas General Assembly, Criminal
Law, 24 UALR L.J. 429.

CHAPTER 76

OPERATION OF MOTORBOATS WHILE INTOXICATED

- SECTION.
5-76-101. Definitions.
5-76-102. Unlawful acts.
5-76-103. Penalties.
5-76-104. Implied consent.
5-76-105. Chemical analysis.
- SECTION.
5-76-106. Authority of State Board of Health.
5-76-107. Unlawful acts by underage operator.
5-76-108. Fines for violating § 5-76-107.

Effective Dates. Acts 1995, No. 518, § 18: May 1, 1995. Emergency clause provided: “It is hereby found and determined by the General Assembly that the act of operating a motorboat while under the influence of alcoholic beverages or drugs constitutes a serious and immediate threat to the safety of all citizens of this state; that increasing the penalty for this dangerous conduct may serve as a deterrent to such behavior; that increased income derived from the levying of such penalties can best be utilized to provide immediate alcohol and drug safety rehabilitation and treatment programs both to prevent an increase in the use of alcoholic beverages and drugs and to rehabilitate persons convicted of related offenses; and that this Act will increase the penalty for operating a motorboat under the influence of drugs and alcohol and provide alcohol and drug treatment programs to persons

convicted of operating a motorboat under the influence of alcohol or drugs. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after May 1, 1995.”

Acts 1997, No. 788, § 36: became law without the Governor’s signature. Noted Mar. 11, 1997. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the effectiveness of this act on July 1, 1997 is essential to the operation of the state court system, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental progress. Therefore, an emergency is

declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1997.”

Acts 1997, No. 1341, § 35: became law without the Governor’s signature. Noted Apr. 11, 1997. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the effectiveness of this act on July 1, 1997 is essential to the operation of the

state court system, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental progress. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1997.”

RESEARCH REFERENCES

ALR. Liability for death or injury of passenger while boating. 8 ALR 4th 886.

Additional boating liability issues. 35 ALR 4th 104.

Am. Jur. 12 Am.Jur.2d Boats, § 1 et seq.

C.J.S. 22A C.J.S., Crim. L. § 766.

5-76-101. Definitions.

As used in this chapter:

(1) “Controlled substance” means a drug, substance, or immediate precursor in Schedules I-VI of the Uniform Controlled Substances Act, § 5-64-101 et seq.;

(2) “Intoxicated” means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or intoxicant, to such a degree that the operator’s reactions, motor skills, and judgment are substantially altered and the operator constitutes a clear and substantial danger of physical injury or death to himself, herself, or others;

(3) “Motorboat” means any vessel operated upon water and that is propelled by machinery, whether or not the machinery is the principal source of propulsion;

(4) “Operator” means a person who is controlling the speed and direction of a motorboat or a person who is in direct physical control of the motorboat;

(5) “Underage” means any person who is under twenty-one (21) years of age and may not legally consume alcoholic beverages in Arkansas; and

(6) “Waters” means any public waters within the territorial limits of the State of Arkansas.

History. Acts 1995, No. 518, § 1; 2005, No. 1458, § 1.

Amendments. The 2005 amendment

inserted present (5); redesignated former (5) as present (6); and made related changes.

5-76-102. Unlawful acts.

(a) No person shall operate any motorboat on the waters of this state while:

(1) Intoxicated; or

(2) There is an alcohol concentration in the person's breath or blood of eight-hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

(b)(1) In the case of a motorboat or device, only if the certified law enforcement officer has probable cause to believe that the operator of the motorboat is operating while intoxicated or operating while there is an alcohol concentration of eight-hundredths (0.08) in the person's breath or blood, the certified law enforcement officer may administer and may test the operator at the scene by using a portable breathtesting instrument or other approved method to determine if the operator may be operating a motorboat or device in violation of this section.

(2) The consumption of alcohol or the possession of an open container aboard a vessel does not in and of itself constitute probable cause.

(c)(1)(A) For a first offense, a person violating this section shall be punished by imprisonment in the county or municipal jail for not more than one (1) year or by a fine of not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000) or by both fine and imprisonment.

(B) In addition, the court shall order the person not to operate a motorboat for a period of ninety (90) days.

(2)(A)(i) For a second offense within a three-year period, a person violating this section shall be punished by a fine of not less than five hundred dollars (\$500) nor more than two thousand five hundred dollars (\$2,500) and by imprisonment in the county or municipal jail for not more than one (1) year.

(ii) The sentence shall include a mandatory sentence that is not subject to suspension or probation of imprisonment in the county or municipal jail for not less than forty-eight (48) consecutive hours or community service for not less than twenty (20) days.

(B) In addition, the court shall order the person not to operate a motorboat for a period of one (1) year.

(3)(A) For a third or subsequent offense within a three-year period, a person violating this section shall be punished by a fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) and by imprisonment in the county or municipal jail for not less than sixty (60) days nor more than one (1) year, to include a minimum of sixty (60) days which shall be served in the county or municipal jail and that cannot be probated or suspended.

(B) In addition, the court shall order the person not to operate a motorboat for a period of three (3) years.

(4) Any person who operates a motorboat on the waters of this state in violation of a court order shall be imprisoned for ten (10) days.

(d) A person who has been arrested for violating this section shall not be released from jail, under bond or otherwise, until the alcohol concentration is less than eight-hundredths (0.08) in the person's breath or blood and the person is no longer intoxicated.

(e)(1) In any criminal prosecution of a person charged with violating subsection (a) of this section, the amount of alcohol in the defendant's blood at the time of or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance, gives rise to the following:

(A) If there was at that time an alcohol concentration of four-hundredths (0.04) or less in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(B) If there was at that time an alcohol concentration in excess of four-hundredths (0.04) but less than eight-hundredths (0.08) in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(2) The provisions of subdivision (e)(1) of this section shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(3)(A) A record or report of a certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure, when duly attested to by the Director of the Division of Health of the Department of Health and Human Services or his or her assistant, in the form of an original signature or by certification of a copy.

(B) These documents are self-authenticating.

(f) The fact that any person charged with violating subsection (a) of this section is or has been legally entitled to use alcohol or a controlled substance does not constitute a defense against any charge of violating subsection (a) of this section.

(g) Any fine for a violation of this chapter shall be remitted to the issuing law enforcement office to be used by the law enforcement office for the administration and enforcement of this chapter.

(h) Neither reckless operation of a motorboat nor any other boating or water safety infraction is a lesser included offense under a charge in violation of this section.

History. Acts 1995, No. 518, §§ 2-4, 6, 11, 12, 14; 2001, No. 561, §§ 25-27; 2005, No. 1461, § 1.

Amendments. The 2001 amendment rewrote (a)(2); in (b)(1), substituted “an alcohol concentration ... breath or blood” for “one-tenth of one percent (0.10%) or more, by weight, of alcohol in the person’s blood” and “portable breath-testing instrument” for “field breathalyzer”; substituted “the alcohol concentration ... breath or blood” for “there is less than one-tenth of one percent (0.10%) by weight of alcohol in the person’s blood” in (d); substituted “an alcohol concentration ... or less” for

“one-twentieth of one percent (0.05%) or less, by weight, of alcohol” in (e)(1)(A); substituted “an alcohol concentration ... eight-hundredths (0.08)” for “in excess of one-twentieth of one percent (0.05%) but less than one-tenth of one percent (0.10%) by weight, of alcohol” in (e)(1)(B); in (e)(3)(A), substituted “Office of Alcohol Testing” for “Blood Alcohol Program” and “duly attested to by the director” for “attested to by the program director”; and made minor stylistic changes throughout.

The 2005 amendment substituted “four (4) hours” for “two (2) hours” in (e)(1).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-76-103. Penalties.

(a) In addition to any other penalty provided in § 5-76-102, any person who pleads guilty or nolo contendere to or who is found guilty of violating § 5-76-102 is required to complete an alcohol education program as prescribed and approved by the Arkansas Highway Safety Program or an alcoholism treatment program as approved by the Bureau of Alcohol and Drug Abuse Prevention of the Division of Health of the Department of Health and Human Services.

(b) The alcohol education program may collect a program fee of up to fifty dollars (\$50.00) per enrollee to offset program costs.

(c)(1) A person ordered to complete an alcoholism treatment program under this section may be required to pay, in addition to the costs collected for treatment, a fee of up to twenty-five dollars (\$25.00) to offset the additional costs associated with reporting requirements under this chapter.

(2) The alcohol education program shall report semiannually to the Arkansas Highway Safety Program all revenue derived from this fee.

History. Acts 1995, No. 518, § 5; 1997, No. 788, § 2; 1997, No. 1341, § 2.

A.C.R.C. Notes. Acts 1997, No. 788, § 1, and Acts 1997, No. 1341, § 1, provided:

“SECTION 1. (a) It is hereby found by the General Assembly that the current system of funding the state judicial system has created inequity in the level of judicial services available to the citizens of the state. It is further determined that, with the passage and implementation of Act 1256 of 1995, a uniform structure for the accounting and distribution of court

generated funds has been established and reliable data on the cost of providing court services and the revenue produced by the court system now exists.

“(b) It is, therefore, the intent of this Act to begin to phase in the responsibility of the funding of a part of the state trial court system from county government to the state. It is, further, the intent of this Act to continue and improve the reporting of information from cities and counties concerning the costs of providing the court system and the revenues produced from court costs, fees, and fines.”

Cross References. Transition to state funding, § 16-87-301.

5-76-104. Implied consent.

(a)(1) Any person who operates a motorboat or is in actual physical control of a motorboat in this state is deemed to have given consent, subject to the provisions of subsection (c) of this section, to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood if:

(A) The person is arrested for any offense arising out of an act alleged to have been committed while the person was operating a motorboat while intoxicated or operating a motorboat while there was an alcohol concentration of at least eight-hundredths (0.08) in the person's breath or blood;

(B) The person is involved in an accident while operating a motorboat; or

(C) At the time the person is arrested for operating a motorboat while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating a motorboat, is intoxicated or has an alcohol concentration of eight-hundredths (0.08) or more in his or her breath or blood.

(2) Any person who is dead, unconscious, or otherwise in a condition rendering the person incapable of refusal, is deemed not to have withdrawn the consent provided by subdivision (a)(1) of this section, and a chemical test may be administered subject to the provisions of subsection (c) of this section.

(3)(A) When a person operating a motorboat is involved in an accident resulting in loss of human life or when there is reason to believe that death may result, a law enforcement officer shall request and the person shall submit to a chemical test of the person's blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood.

(B) The law enforcement officer shall cause the chemical test to be administered to the person, including a person fatally injured.

(b)(1) If a court determines that a law enforcement officer had reasonable cause to believe an arrested person had been operating a motorboat in violation of § 5-76-102(a) and the person refused to submit to a chemical test upon request of the law enforcement officer, the court shall levy a fine of not less than one thousand dollars (\$1,000) and not to exceed two thousand five hundred dollars (\$2,500) and suspend the operating privileges of the person for a period of six (6) months, in addition to any other suspension imposed for violating § 5-76-102(a).

(2) If a person operating a motorboat is involved in an accident resulting in loss of human life and the person refuses to submit to a chemical test upon the request of the law enforcement officer, the court shall levy a fine of not less than two thousand five hundred dollars

(\$2,500) and not to exceed five thousand dollars (\$5,000) and suspend the operating privileges of the person for a period of two (2) years, in addition to any other suspension imposed for violating § 5-76-102(a).

(c)(1) A chemical test shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating a motorboat while intoxicated or while there is an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood.

(2)(A) The law enforcement agency employing the law enforcement officer shall designate which chemical test is administered, and the law enforcement agency is responsible for paying any expense incurred in conducting the chemical test.

(B) If a person tested requests that an additional chemical test be made, as authorized in subsection (g) of this section, the cost of the additional chemical test shall be borne by the person tested.

(3) If any person objects to the taking of his or her blood for a chemical test, as authorized in this section, the breath or urine of the person may be used to make the chemical analysis.

(d)(1) To be considered valid under the provisions of this chapter, a chemical analysis of a person's blood, urine, or breath shall be performed according to a method approved by the State Board of Health or by an individual possessing a valid permit issued by the Division of Health of the Department of Health and Human Services for that purpose.

(2) The division may:

(A) Approve a satisfactory technique or method for the chemical analysis;

(B) Ascertain the qualifications and competence of an individual to conduct the chemical analysis; and

(C) Issue a permit to conduct the chemical analysis that is subject to termination or revocation at the discretion of the division.

(e)(1) When a person submits to a blood test at the request of a law enforcement officer, blood may be drawn by a physician or by a person acting under the direction and supervision of a physician.

(2) The limitation provided in subdivision (e)(1) of this section does not apply to the taking of a breath or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(f) Upon the request of a person who submits to a chemical test at the request of a law enforcement officer, full information concerning the

chemical test shall be made available to the person or his or her attorney.

(g)(1) A person tested may have a physician, qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person of the right provided in subdivision (g)(1) of this section.

(3) The refusal or failure of a law enforcement officer to advise the person of the right provided in subdivision (g)(1) of this section and to permit and assist the person to obtain the chemical test precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

History. Acts 1995, No. 518, §§ 7-10; 1997, No. 823, § 1; 2001, No. 561, §§ 28, 29.

Amendments. The 2001 amendment inserted "breath or" in (a)(1), (a)(1)(A), (a)(1)(C), (a)(1)(3)(A), and (c)(1); inserted "or is in actual physical control of a motorboat" in (a)(1); substituted "an alcohol concentration of at least eight-hundredths (0.08)" for "one-tenth of one percent

(0.10%) or more, by weight, of alcohol" in (a)(1)(A); substituted "an alcohol concentration of eight-hundredths (0.08) or more" for "one-tenth of one percent (0.10%) or more, by weight, of alcohol" in (a)(1)(C) and (c)(1); redesignated former (a)(3) as present (a)(3)(A) and (a)(3)(B); and deleted "test or" following "The chemical" in (c)(1).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-76-105. Chemical analysis.

(a)(1) Any instrument used to determine the alcohol content of the breath for the purpose of determining if the person was operating a motorboat while intoxicated or with an alcohol concentration of eight-hundredths (0.08) or more shall be so constructed that the analysis is made automatically when a sample of the person's breath is placed in the instrument and without any adjustment or other action of the person administering the analysis, and the instrument shall be so constructed that the alcohol content is shown by visible digital display on the instrument and on an automatic readout.

(2) The instrument performing the chemical analysis shall have been certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Any breath analysis made by or through the use of an instrument that does not conform to the requirements prescribed in this subsection is inadmissible in any criminal or civil proceeding.

(b)(1) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of the person who performs the calibration

test or check on the instrument, the operator of the instrument, or a representative of the Office of Alcohol Testing of the Division of Health of the Department of Health and Human Services.

(2) The testimony of the appropriate analyst or official may be compelled by a subpoena given ten (10) days prior to the date of hearing or trial, in which case, the records and reports are admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

History. Acts 1995, No. 518, §§ 12, 13; 2001, No. 561, §§ 30, 31.

Amendments. The 2001 amendment, in (a)(1), deleted “machine or” preceding “instrument used,” deleted “or blood of any person by analysis of the breath of the person” preceding “for the purpose of,” substituted “an alcohol concentration of eight-hundredths (0.08) or more” for “a blood alcohol content of one-tenth of one

percent (0.10%) or more, by weight,” deleted “machine or” preceding “instrument and without,” substituted “instrument shall” for “machine shall,” deleted “blood” preceding “alcohol content” and substituted “instrument and on” for “machine and on”; rewrote (b)(1); and substituted “a subpoena given ... in which case” for “subpoena, in which case” in (b)(2).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

5-76-106. Authority of State Board of Health.

(a) The State Board of Health may adopt appropriate regulations to carry out the intent and purposes of this chapter, and only an instrument approved by the board as meeting the requirements of this section and § 5-76-105 and regulations of the board shall be used for making a breath analysis for determining blood alcohol content.

(b)(1) The board specifically may limit by its regulations the types or models of testing devices that may be approved for use in Arkansas for the purposes set forth in this chapter.

(2) The approved types or models shall be specified by manufacturer's name and model.

History. Acts 1995, No. 518, § 13.

CASE NOTES

Adoption of Regulations.

Pursuant to this section, the State Health Department adopted revised “Regulations for Alcohol Testing” on November 15, 1995, five months after the effective

date of this section, which regulations provided that they applied to both driving while intoxicated and boating while intoxicated. *State v. Jones*, 338 Ark. 781, 3 S.W.3d 781 (1999).

5-76-107. Unlawful acts by underage operator.

(a) No underage person shall operate any motorboat on the waters of this state while:

(1) Intoxicated; or

(2) There is an alcohol concentration in the underage person's breath or blood of two-hundredths (0.02) but less than eight-hundredths (0.08) based upon the definition of breath, blood, and urine concentration in § 5-65-204.

(b)(1) A certified law enforcement officer may test an underage person who operates a motorboat using a portable breath-testing instrument or other approved method to determine if the underage person may be operating a motorboat or device in violation of this section only if the certified law enforcement officer has probable cause to believe that:

(A) The underage person is operating the motorboat while intoxicated; or

(B) The underage person is operating the motorboat while there is an alcohol concentration of two-hundredths (0.02) but less than eight-hundredths (0.08) in the underage person's breath or blood.

(2) The consumption of alcohol or the possession of an open container of an alcoholic beverage aboard a vessel does not alone constitute probable cause.

History. Acts 2005, No. 1458, § 2.

5-76-108. Fines for violating § 5-76-107.

(a) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-76-107 shall be fined not less than:

(1) One hundred dollars (\$100) and not more than five hundred dollars (\$500) for the first offense;

(2) Two hundred dollars (\$200) and not more than one thousand dollars (\$1,000) for the second offense; and

(3) Five hundred dollars (\$500) and not more than two thousand dollars (\$2,000) for the third or subsequent offense.

(b) For the purpose of determining the amount of a fine under this section, an underage person who has one (1) or more previous convictions for a violation of § 5-76-102 is deemed to have a conviction for a violation of § 5-76-107 for each conviction for a violation of § 5-76-102.

History. Acts 2005, No. 1458, § 2.

CHAPTER 77

OFFICIAL INSIGNIA

SUBCHAPTER

1. GENERAL PROVISIONS. [RESERVED.]

2. EMERGENCY LIGHTS AND LAW ENFORCEMENT INSIGNIA SALES.

3. BLUE LIGHT SALES.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — EMERGENCY LIGHTS AND LAW ENFORCEMENT INSIGNIA SALES

SECTION.

5-77-201. Blue light or blue lens cap sales.
5-77-202. Law enforcement insignia sales.

SECTION.

5-77-203. Regulations.

Cross References. Blue light sales,
§ 5-77-301.

5-77-201. Blue light or blue lens cap sales.

(a)(1) It is unlawful to sell a blue light or blue lens cap to any person other than a law enforcement officer or a county coroner.

(2) It is unlawful for a person other than a law enforcement officer or a county coroner to buy a blue light or blue lens cap.

(b) Before selling a blue light or blue lens cap, the seller shall require the buyer to provide identification that legally demonstrates that the buyer is a law enforcement officer or a county coroner.

(c) Any sale of a blue light or blue lens cap shall be reported to the Department of Arkansas State Police on a form prescribed by the department.

(d) A violation of this section is a Class D felony.

(e) As used in this section, “blue light” means an operable blue light that:

(1) Is designed for use by an emergency vehicle, or is similar in appearance to a blue light designed for use by an emergency vehicle; and

(2) Can be operated by use of the vehicle’s battery, the vehicle’s electrical system, or a dry cell battery.

History. Acts 1997, No. 1281, § 1.

Cross References. Lights for emergency vehicles, § 27-36-301 et seq.

5-77-202. Law enforcement insignia sales.

(a)(1) It is unlawful to sell official law enforcement insignia to any person other than a law enforcement officer.

(2) It is unlawful for a person other than a law enforcement officer to buy official law enforcement insignia.

(b) Before selling official law enforcement insignia, the seller shall require the buyer to provide identification that legally demonstrates that the buyer is a law enforcement officer.

(c) A violation of this section is a Class A misdemeanor.

(d) As used in this section, "official law enforcement insignia" means those items relating to the performance of a person's duty as a law enforcement officer when the items are formally sanctioned by the law enforcement agency employing the person.

History. Acts 1997, No. 1281, § 2.

5-77-203. Regulations.

The Department of the Arkansas State Police shall promulgate regulations to implement this subchapter, including regulations that define the type of identification necessary to legally demonstrate that a person is a law enforcement officer or a county coroner.

History. Acts 1997, No. 1281, § 3.

SUBCHAPTER 3 — BLUE LIGHT SALES

SECTION.

5-77-301. Blue light sales.

Cross References. Emergency lights and law enforcement insignia sales, § 5-77-201 et seq.

5-77-301. Blue light sales.

(a)(1) It is unlawful to sell or transfer a blue light to any person other than a certified law enforcement officer.

(2) A sale or transfer of a blue light shall be reported to the Department of Arkansas State Police on a form prescribed by the department.

(b) A violation of this section is a Class A misdemeanor.

(c) As used in this section, "blue light" means an operable blue light that:

(1) Is designed for use by an emergency vehicle, or is similar in appearance to a blue light designed for use by an emergency vehicle; and

(2) Can be operated by use of the vehicle's battery, the vehicle's electrical system, or a dry cell battery.

History. Acts 1997, No. 497, § 2.

Lights for emergency vehicles, § 27-36-

Cross References. Criminal impersonation, § 5-37-208. 301.

CHAPTER 78

TOBACCO

SECTION.

5-78-101. [Repealed.]

5-78-102. Confiscation of tobacco products authorized.

5-78-101. [Repealed.]

Publisher's Notes. This section, concerning the possession, purchase and use of cigarettes by minors, was repealed by

Acts 2005, No. 1962, § 121. The section was derived from Acts 1999, No. 1331, § 1.

5-78-102. Confiscation of tobacco products authorized.

Any cigarette or tobacco product found in the possession of a person under eighteen (18) years of age may be confiscated by a certified law enforcement officer or a school official and immediately destroyed.

History. Acts 1999, No. 1331, § 2.

CHAPTER 79

BODY ARMOR

SECTION.

5-79-101. Criminal possession of body armor.

5-79-101. Criminal possession of body armor.

(a) No person may possess body armor if that person has been found guilty of or has pleaded guilty or nolo contendere to any of the following offenses:

- (1) Capital murder, § 5-10-101;
- (2) Murder in the first degree, § 5-10-102;
- (3) Murder in the second degree, § 5-10-103;
- (4) Manslaughter, § 5-10-104;
- (5) Aggravated robbery, § 5-12-103;
- (6) Battery in the first degree, § 5-13-201; or
- (7) Aggravated assault, § 5-13-204.

(b) As used in this section, "body armor" means any material designed to be worn on the body and to provide bullet penetration resistance.

(c) A violation of this section constitutes a Class A misdemeanor.

History. Acts 1999, No. 1449, § 1; 2005, No. 1994, § 299.

deleted "shall be deemed the criminal possession of body armor" following "violation of this section" in (c).

Amendments. The 2005 amendment

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Hoax substance.

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Immediate precursor.

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Juror.

- Offenses relating to judicial proceedings, §5-53-101.
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Juvenile training school.

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- Selling or loaning pornography to minors, §5-68-501.

Law enforcement officer.

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Livestock.

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Magnetic tape memory.

- Selling or loaning pornography to minors, §5-68-501.

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Motorboat.

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Oath.

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Official proceeding.

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- Cruelty to animals, §5-62-110.
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Partial birth abortion, §5-61-202.**Passenger.**

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Performance.

- Selling or loaning pornography to minors, §5-68-501.

Person.

- Controlled substances, §5-64-101.
- Cruelty to animals, §5-62-110.
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- Selling or loaning pornography to minors, §5-68-501.
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Unauthorized copying or sale, §5-37-510.

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Criminal liability.

Justification, §5-2-601.

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Ephedrine, §5-64-1103.

Proper identification.

Controlled substances.

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Property.

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Damage or destruction of property, §5-38-101.

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Pseudoephedrine, §5-64-1103.**Public accommodation.**

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Theft of public benefits, §5-36-201.

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Public safety agency.

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Purposely.

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Qualified psychiatrist.

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Reasonable belief.

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Render criminal assistance.

Terrorism, §5-54-201.

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Sadomasochistic abuse.

Obscenity, §5-68-302.

Selling or loaning pornography to minors, §5-68-501.

Use of children in sexual performances, §5-27-401.

Sale for personal use.

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Sawed-off or short-barreled rifle.

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Serious bodily harm.

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Sexual activity.

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Sexual penetration.

Human immunodeficiency virus.

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Sexual performance.

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State.

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